

1930

## Appeals from Decisions of the Federal Radio Commission

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### Recommended Citation

Louis G. Caldwell, *Appeals from Decisions of the Federal Radio Commission*, 1 J. AIR L. & COM. 274 (1930)  
<https://scholar.smu.edu/jalc/vol1/iss3/3>

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## APPEALS FROM DECISIONS OF THE FEDERAL RADIO COMMISSION

LOUIS G. CALDWELL\*

*Introduction.* Appeals from decisions of the Federal Radio Commission are provided for, and governed by, Section 16 of the Radio Act of 1927<sup>1</sup> Because a number of difficult questions turn on the peculiar language of the section, it is reprinted in full in a foot note.<sup>2</sup> Its very serious defects and its urgent need for thor-

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1. Approved Feb. 23, 1927, 44 Sta. 1162. Under the Act the Commission was to be the licensing authority for a period of one year after its first meeting (which was held Mar. 15, 1927), and thereafter was to be a sort of an appellate tribunal reviewing actions of the Secretary of Commerce who was to be the licensing authority (as he had been under the preceding Radio Act of 1912, 37 Stat. 302). By successive amendments approved Mar. 28, 1928, Mar. 4, 1929, and Dec. 19, 1929, the Commission has been continued as the licensing authority and under the last amendment it is henceforth to continue as such "until otherwise provided by law." Under S. J. Res. 176, 71st Cong., 2d Sess., which has been passed by the Senate and, together with an amendment substituting a new Sec. 16, has been reported favorably by the House Committee on Merchant Marine and Fisheries (Rep. No. 1633, May 24, 1930), it is possible that by the time this article appears, the power of radio regulation now reposed in the Secretary of Commerce by the Radio Act of 1927 will have been transferred to the Commission, and the Radio Division of the Department will have become a part of the Commission's organization. No consideration, therefore, will be given in this article to Sec. 5 of the Radio Act of 1927 governing review of decisions of the Secretary of Commerce by the Commission. See article entitled *Practice and Procedure before the Federal Radio Commission*, JOURNAL OF AIR LAW, Vol. I, No. 2 (April, 1930), pp. 149-150. For convenience this article is hereinafter cited as "Radio Prac. & Proc."

2. "Sec. 16. Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia; and any licensee whose license is revoked by the commission shall have the right to appeal from such decision of revocation to said Court of Appeals of the District of Columbia or to the district court of the United States in which the apparatus licensed is operated, by filing with said court, within twenty days after the decision complained of is effective, notice in writing of said appeal and of the reasons therefor.

"The licensing authority from whose decision an appeal is taken shall be notified of said appeal by service upon it, prior to the filing thereof, of a certified copy of said appeal and of the reasons therefor. Within twenty days after the filing of said appeal the licensing authority shall file with the court the originals or certified copies of all papers and evidence presented to it upon the original application for a permit or license or in the hearing upon

oughgoing amendment have been the subject of extended comment and discussion elsewhere.<sup>3</sup>

Briefly, Section 16 provides for appeals to the Court of Appeals of the District of Columbia from the following kinds of decisions by the Federal Radio Commission:

1. Refusals by the Commission to grant any of the following four kinds of application:

- (a) Application for construction permit.
- (b) Application for license.
- (c) Application for renewal of license.
- (d) Application for modification of license.

2. Revocation of license by the Commission.

In the first class of cases, only the denied applicant may appeal; in the second class, only the licensee whose license is revoked may appeal. The licensee whose license is revoked may, at his option, appeal to the district court of the United States in which the apparatus licensed is located.

All told, fifty appeals have been taken from decisions of the Commission to the Court of Appeals, of which twelve have been decided in a series of eight opinions,<sup>4</sup> eighteen are now pending

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said order of revocation, and also a like copy of its decision thereon and a full statement in writing of the facts and the grounds for its decision as found and given by it. Within twenty days after the filing of said statement by the licensing authority either party may give notice to the court of his desire to adduce additional evidence. Said notice shall be in the form of a verified petition stating the nature and character of said additional evidence, and the court may thereupon order such evidence to be taken in such manner and upon such terms and conditions as it may deem proper.

"At the earliest convenient time the court shall hear, review, and determine the appeal upon said record and evidence, and may alter or revise the decision appealed from and enter such judgment as to it may seem just. The revision by the court shall be confined to the points set forth in the reasons of appeal."

3. Report of Standing Committee on Radio Law, Amer. Bar Reports, Vol. 54 (1929), pp. 461-469, 477; Report of Standing Committee on Communications, Amer. Bar Reports, Vol. 55 (1930), not yet published, Chap. V, Part I; Hearings on S. 6, 71st Cong., 1st Sess. (May, 1929), pp. 149-156. The first mentioned report will be hereinafter referred to as "1929 Radio Com. Rep."; the second, as "1930 Communications Com. Rep."; the hearings, as "Hearings on S. 6." Proposals now pending in Congress to remedy the defects in Sec. 16 are described and discussed in 1930 Communications Com. Rep., Chap. V.

4. *General Electric Company v. Commission*, 31 F. (2d) 630, involving three appeals from one decision of the Commission, two by the General Electric Company and one by the State of New York, *Richmond Development Corporation v. Commission*, 35 F. (2d) 883; *Technical Radio Laboratory v. Commission*, 36 F. (2d) 111; *City of New York v. Commission*, 36 F. (2d) 115; *Carrell v. Commission*, 36 F. (2d) 117; *Great Lakes Broadcasting Com-*

before the Court, and twenty have been voluntarily or involuntarily dismissed.<sup>5</sup>

*Administrative Function of Reviewing Court.* By its recent decision in *Federal Radio Commission v. General Electric Company*,<sup>6</sup> the Supreme Court of the United States held that in reviewing decisions of the Commission the Court of Appeals exercises administrative and not judicial functions, and dismissed a writ of certiorari previously granted.<sup>7</sup> The opinion, written by Mr. Justice Van Devanter, after summarizing the statute, states in part:

"We think it plain from this resume of the pertinent parts of the act that the powers confided to the commission respecting the granting and renewal of station licenses are purely administrative and that the provision for appeals to the Court of Appeals does no more than make that court a superior and revising agency in the same field. The court's province under that provision is essentially the same as its province under the legislation which up to a recent date permitted appeals to it from administrative decisions of the Commissioner of Patents. Indeed, the provision in the Act of 1927 is patterned largely after that legislation. And while a few differences are found, there is none that is material here."

After a review of the authorities,<sup>8</sup> and after distinguishing statutes

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*pany, Voliva, and Agricultural Broadcasting Company v. Commission*, 37 F. (2d) 993; *Chicago Federation of Labor v. Commission*, not yet reported, U. S. Daily, May 9, 1930; *Universal Service Wireless, Inc. v. Commission*, not yet reported, U. S. Daily, May 8, 1930. The style in which the cases are entitled is not entirely appropriate, since it suggests that the proceedings are in the nature of the statutory remedies which have been created for judicial review of decisions of the Interstate Commerce Commission and the Federal Trade Commission. A more appropriate style would be "*In re Application of John Doe*." See 1929 Radio Com. Rep., p. 462, footnote 5.

5. A list of these cases will be found in 1929 Radio Com. Rep., pp. 462-467, footnotes 4, 5, 17 and 21, and in 1930 Communications Com. Rep., Chap. III, part 5, footnotes 6, 7, 9, 10 and 11. Five new appeals have been taken since the above was written.

6. May 19, 1930, No. 122, Adv. Ops., 1929-1930, p. 514, U. S. Daily, May 20, 1930. The decision of the Court of Appeals is reported as *General Electric Company v. Federal Radio Commission*, 31 F. (2d) 630. A petition for certiorari by the City of New York with respect to the decision reported as *City of New York v. Commission*, 36 F. (2d) 115 was denied on March 12, 1930, Adv. Ops., 1929-1930, p. 356. Another petition for certiorari by Agricultural Broadcasting Company with respect to *Great Lakes Broadcasting Co., et al. v. Commission*, 37 F. (2d) 993, was denied on June 3, 1930 (U. S. Daily, May 26, June 4, 1930), Adv. Ops., 1929-1930, p. 653.

7. Petition granted Oct. 14, 1929, Adv. Ops., 1929-1930, pp. 22, 346. Petition for mandamus and/or prohibition set down for hearing, *ibid.* p. 22, and later voluntarily withdrawn, U. S. Daily, Jan. 8, 1930.

8. *Butterworth v. Hoe*, 112 U. S. 50, 60; *Postum Cereal Company v. California Fig Nut Company*, 272 U. S. 693, 700-701; *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 442-444; *Liberty Warehouse Co. v. Crannis*, 273 U. S. 70, 74; *Willing v. Chicago Auditorium Association*, 277 U. S. 274, 289; *Ex parte Bakelite Corporation*, 279 U. S. 438, 449; *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U. S. 711, 724-727.

governing appeals from other commissions,<sup>9</sup> the opinion concludes:

"Of course the action of the Court of Appeals in assessing the costs against the commission did not alter the nature of the proceeding.

"Our conclusion is that the proceeding in that court was not a case or controversy, in the sense of the judiciary article, but was an administrative proceeding, and therefore that the decision therein is not reviewable by this Court."

The facts of the case need not be here reviewed further than to state that the decision of the Commission appealed from was a denial of an application for renewal of license for Station WGY at Schenectady, N. Y., consisting in a reduction in hours of operation for the ensuing license period beginning November 11, 1928.<sup>10</sup> The judgment of the Court of Appeals required the Commission to issue the renewal license applied for, and assessed costs against the Commission. It was the contention of the Commission before the Supreme Court, *inter alia*, that in rendering the judgment the Court of Appeals had, as a matter of fact, exercised judicial functions, e. g., by entering judgment for costs,<sup>10a</sup> by passing on the constitutionality of the Radio Act of 1927, by entering a stay order against the Commission,<sup>10b</sup> and by entering judgment holding certain of the Commission's regulations invalid by necessary implication.<sup>10c</sup> The Commission also contended that, since the provision for appeal to the district courts of the United States is valid only if the reviewing court is confined to questions of law, the provision for appeal to the Court of Appeals should be construed so as to save the section from partial invalidity. The opinion of the Supreme Court is not as clear as might be desired with regard to the issues thus raised. In providing for appeals from decisions of a tribunal such as the Federal Radio Commission (which manifestly is an administrative and not a judicial body), Congress had not merely two, but *three*, alternatives in fixing the character of the function to be reposed in the Court of Appeals (which, under the decisions, is

9. Statutes governing appeals from the Commissioner of Patents and from the Board of Tax Appeals, and suits to enforce or set aside orders of the Interstate Commerce Commission and orders of the Federal Trade Commission.

10. See *Radio Prac. & Proc.*, pp. 154-155; 1929 Radio Com. Rep., pp. 464-465.

10a. *Tesla Electric Co. v. Scott*, 101 Fed. 524.

10b. *In re McFarland*, 30 App. D. C. 365, 390.

10c. *U. S. ex rel. Steinmetz v. Allen*, 192 U. S. 543; *U. S. v. Antikamnia Chemical Co.*, 231 U. S. 654, that regulations of the Commission have the force of law, see *U. S. v. Eaton*, 144 U. S. 677; *U. S. v. Grimaud*, 220 U. S. 506; *Maryland Casualty Co. v. U. S.*, 251 U. S. 342; *Daeuffer-Lieberman Brg. Co., Inc., v. U. S.*, 36 F. (2d) 568.

manifestly a legislative and not a constitutional court): (1) the function might be purely judicial, as it is in the case of appeals from decisions of the Board of Tax Appeals, or in suits to enforce or set aside orders of the Interstate Commerce Commission or the Federal Trade Commission; or (2) the function might be purely administrative, as it is in the case of appeals from decisions of the Commissioner of Patents; or (3) the function might be *both* judicial and administrative, as it seems to be in the case of decisions of the Court of Claims and of the Board of Tax Appeals.<sup>11</sup> In the *General Electric Company* case the Supreme Court has excluded the first of the foregoing alternatives, and to this extent, in the light of its previous decisions, the decision seems unassailable. The language of the opinion seems to indicate that Section 16 comes within the second alternative, although there is nothing specifically excluding the third. If Section 16 comes within the second alternative, and the Court of Appeals, with administrative power only, improperly exercises judicial functions, why should not the Supreme Court have power to review the exercise of such judicial functions (on the same theory and to the same extent that it now reviews judgments of the district courts of the United States entered without jurisdiction)? The question is directly raised by the judgment for costs which the Court of Appeals entered against the Commission, with regard to which the Supreme Court says merely that "this action . . . did not alter the nature of the proceeding." If Section 16 comes within the third alternative, why may not the Supreme Court review the *judicial* actions of the Court of Appeals? It may be that the nature of the proceeding definitely determines these questions, but the reasoning which leads to such a conclusion would be of great assistance in drafting the much-needed amendments to Section 16.

Since the door is closed to review by the Supreme Court, anomalous situations are presented. If the Court of Appeals renders a decision without jurisdiction (e. g., on an appeal not filed within the prescribed statutory period), or in excess of its jurisdiction (e. g., affecting a person not legally before it), or erroneous as a matter of law (e. g., an erroneous construction of the standard of "public interest, convenience, or necessity"), a person injured by such a decision obviously must proceed on the theory that the de-

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11. *Ex parte Bakelite Corporation*, 279 U. S. 438 and cases reviewed therein. See statute governing certification to Supreme Court of questions of law by Court of Claims, and certiorari by Supreme Court to Court of Claims, 43 Stat. 939; U. S. Code, Title 28, Sec. 288.

cision is void and subject to collateral attack, if he is to enforce recognition of his rights. Although he may occasionally be able to get relief by appropriate proceedings directed against the person favored by such a decision, in the usual case he must proceed against the Commission by suit for injunction or mandamus in the Supreme Court of the District of Columbia.<sup>12</sup> Curiously, on appeal he will find himself before the very court whose decision he is attacking.

*Validity of Section 16.—Review by District Courts of the United States.* The language of Section 16 with regard to appellate procedure, the taking of evidence, and the scope of the reviewing court's power is the same with respect both to the Court of Appeals and to the district courts of the United States. Under the reasoning of the Supreme Court, and the authorities it relies upon, the provision for appeals to the district courts is unconstitutional, since such courts are constitutional courts and may not be invested with administrative functions.<sup>13</sup> The act of revoking a license is usually considered no less administrative in character than the act of granting a license, at least where the existence of grounds for revocation depends on issues of fact confided in the first instance to administrative discretion.<sup>14</sup> The constitutionality of the provision is now under attack.<sup>15</sup>

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12. The possibility that suit for injunction or mandamus might be maintained in the Supreme Court of the District of Columbia against the members of the Court of Appeals, although apparently a logical method of attack if the latter Court sits as a purely administrative tribunal, seems as a practical matter rather a remote one. Suits for mandamus and/or prohibition in the Supreme Court of the United States against the Court of Appeals seem to be foreclosed by statutory restrictions which have been held to confine the employment of the writs to cases where they are ancillary to the Supreme Court's original or appellate jurisdiction. *Marbury v. Madison*, 1 Cranch 137, 176; *In re Massachusetts*, 197 U. S. 482, 488. In the writer's opinion, the possibilities of the use of the writ of prohibition in such a case, however, have not been sufficiently explored, although it is extremely probable that the Supreme Court would hold that the writ does not lie. See *Ex parte Bakelite Corporation*, 279 U. S. 438, 448.

13. See cases cited in footnote 8, *supra*, and *Ma-King Products Co. v. Blair*, 271 U. S. 449.

14. *Blair v. Graupner*, 29 F. (2d) 815, 816; *Burns v. Doran*, 37 F. (2d) 484. Note that under Sec. 15 of the Radio Act, power is given to the district courts to revoke radio licenses as part of the penalty for violation of anti-trust laws, etc.

15. In *General Broadcasting System, Inc., v. Bridgeport Broadcasting Station, Inc.*, a suit now pending in the U. S. District Court in Connecticut. This extraordinary case is discussed in more detail later on. The validity of the provision has been frequently questioned. See comment on Radio Act of 1927 in *Amer. Bar. Assn. Jour.* (June-July, 1927), Vol. 13, pp. 343, 368. If the provision is unconstitutional and, acting under it, a district court nevertheless takes jurisdiction over an appeal from a decision of the Commission, may the question of constitutionality be raised on appeal from the district court to the circuit court of appeals and ultimately to the Supreme Court, or should the question be raised only in some extraordinary proceed-

*Validity of Section 16.—Jurisdiction of Court of Appeals with respect to persons other than appellants.* Whether Section 16 is to be construed to give the Court of Appeals power to render a judgment adversely affecting any person other than the immediate parties, i. e., the appellant and the Commission, is discussed under another sub-heading. If it be construed to give the Court such power, then its validity is questioned in cases now pending before that Court<sup>16</sup> and elsewhere.<sup>17</sup> The contentions made are (1) that persons holding licenses or construction permits from the Commission, or who have been found by the Commission to be entitled to licenses or construction permits, have rights which are protected by the Fifth Amendment against deprivation without due process of law,<sup>18</sup> and (2) that a statute purporting to confer upon a court or administrative tribunal power to deprive persons of such rights without notice and hearing is invalid for want of due process,<sup>19</sup> it being necessary that the statute itself provide for notice and hearing in order to meet the requirements of the Constitution.<sup>20</sup> The writer refrains from expressing any opinion as to the correctness of these contentions.

*Appealable Decisions: In General.* It is possible to discern a slight modification of the attitude of the Court of Appeals in its construction of Section 16 with respect to what constitute appealable decisions of the Commission. In its first decision under the

ing instituted for the purpose? Under the Supreme Court's decision, "the nature of the proceeding would seem to be determinative against the right to take such an appeal."

16. In the group of cases generally known and hereinafter referred to as the *Short Wave Appeals* (*Intercity Radio Telegraph Company v. Commission*, No. 4987; *Wireless Telegraph & Communications Company v. Commission*, No. 4988; *R. C. A. Communications, Inc. v. Commission*, No. 4990; *Mackay Radio & Telegraph Company v. Commission*, No. 4991).

17. Apparently the question is, or may be, involved in *Bridgeport Broadcasting Station, Inc. v. Commission* (D. C., D. Conn.).

18. *Garfield v. United States, et rel. Goldsby*, 211 U. S. 249; *United States v. Wildcat*, 244 U. S. 11; *Frost v. Corporation Commission*, 278 U. S. 515; *Kemohah v. Shaffer Oil & Refining Co.*, 38 F. (2d) 665.

19. *Twining v. New Jersey*, 211 U. S. 78; *Hovey v. Elliott*, 167 U. S. 409; *Postal Telegraph-Cable Company v. Newport*, 247 U. S. 464; *Interstate Commerce Commission v. L. & N. R. Co.*, 227 U. S. 88; *Parsons v. District of Columbia*, 170 U. S. 45; *Wight v. Davidson*, 181 U. S. 371; *Railroad Commission Cases*, 116 U. S. 307; *Chicago M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418; *Prentiss v. Atlantic Coast Line*, 211 U. S. 210; *Interstate Commerce Commission v. Northern Pacific R. Co.*, 216 U. S. 538; *Bratton v. Chandler*, 260 U. S. 110; *Goldsmith v. U. S. Board of Tax Appeals*, 270 U. S. 117; *Wilkinson v. Dougherty* (C. A., D. C.), 24 F. (2d) 1007.

20. *Coe v. Armour Fertilizer Works*, 237 U. S. 413 and cases therein cited; *Coffey v. Noel* (D. C., W. Va.), 11 F. (2d) 399.



section, *General Electric Company v. Commission*,<sup>21</sup> it held that a decision of the Commission purporting to *grant* an application for renewal of license by issuing a license with reduced hours of operation, is in reality a denial of the application. This is a liberal, but a sensible, interpretation of the statute. In its second decision, *Richmond Development Corporation v. Commission*,<sup>22</sup> the Court reversed a decision of the Commission denying an application for an extension of time for the completion of a station, a permit for which had been previously granted and twice extended, and the application for the third extension of which had been filed fifteen days after the expiration of the second extension. To entertain such an appeal, the Court necessarily had to hold that an application for extension comes within one of the four classes of applications specified in Section 16; in other words, that it is an application for a construction permit, or (a more remote possibility) an application for modification of license.<sup>23</sup> This decision seemed to forecast a very liberal construction of Section 16. There is occasion for difference of opinion as to its correctness.<sup>24</sup>

In *Universal Service Wireless, Inc. v. Commission*,<sup>24a</sup> the Court of Appeals rendered its first (and, so far, its only) holding that a case was not appealable under the statute. The facts of the case, for the purpose of the point under discussion, were as follows: Appellant, together with ten other corporations of a similar nature, had filed applications for construction permits with the Commission covering the eventual use of domestic high frequency channels. By action taken December 22, 1928, the Commission "granted" the applications.<sup>25</sup> Construction permits were never issued, however, the chief reason being that appellant itself insisted that the Commission withhold issuances pending the settling of differences which had arisen between appellant and the other corporations, appellant being dissatisfied with the number of channels allotted to it as between it and the other corporations. No agreement ever having been

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21. 31 F. (2d) 630.

22. 35 F. (2d) 883.

23. By motion to dismiss and again in its brief and on oral argument the Commission urged that the Court had no jurisdiction to entertain the appeal but the Court did not pass on the point.

24. See the writer's comment on the case in *Recent Decisions under the Radio Act of 1927*, Amer. Bar Assn. Jour. (Jan. 1930), Vol. 16, p. 19.

24a. Not yet reported, U. S. Daily, May 8, 1930.

25. These were part of what have been generally known as the press applications. This particular group of applications asked for 25 channels, and the Commission's records show that by its action of Dec. 22, 1928, it intended to allocate only 20 channels to the group of corporations, the latter to agree among themselves as to the repartition of the channels among themselves.

reached among the parties, the Commission took action on June 20, 1929,<sup>26</sup> disposing of the channels in question in a manner inconsistent with its action of December 22, 1928, and finding that its action of December 22, 1928, was "not effective." Appellant, relying in part upon the *Richmond Development Corporation* case, contended before the Court of Appeals that the Commission's action was in substance a denial of its applications for construction permits. The Court of Appeals dismissed the appeal, saying *inter alia*:

"It is conceded by counsel for appellant that this appeal is not taken from an order denying appellant an application for a license, but is based upon the theory that 'the Commission, by its order of June 20, 1929, attempted to nullify its order of December 22, 1928, and to take away from and deprive appellant of the rights acquired by it under said order.' The weakness of this position consists in the fact that appellant never accepted any rights under the order of December 22, but contested the order consistently and persistently, and on June 5, 1929, announced its refusal to accept any benefits under the order of December 22nd. It, therefore, was not such a party to the order of June 20, 1929, as to give it, under the statute, the right of appeal. Nor can appellant relate his appealable right back to the order of December 22, since the Court is without jurisdiction in that an appeal from that order was not noted within time, consequently, there seems to be no ground upon which the right of appeal can be upheld in this case.

"The right of appeal being a statutory one, the Court cannot dispense with its express provisions, even to the extent of doing equity. *Saltmarsh v. Tuthill*, 12 How. 387; *Carlin v. Goldberg*, 45 App. D. C. 540."<sup>27</sup>

By implication the decision seems to hold that revocation or cancellation of a construction permit (or, at least, an order setting aside a previous order granting an application for construction permit) is not a revocation of license under Section 14. In view of the language of Section 21, which seems to make the issuance of a

26. This order was the final step in the press allocations and contemplated the formation of a single corporation to serve all press interests. Such a corporation was formed (*Press Wireless, Inc.*), and is now endeavoring to protect the press allocations in the *Short Wave Appeals*.

27. See also the following cases cited in the Commission's briefs in support of a strict construction of the statute: *Minneapolis and St. Louis R. R. Co. v. Board of Railroad Commissioners*, 44 Minn. 336, 46 N. W. 559; *New England R. R. Co. v. Hyde*, 101 Fed. 400; *Noland v. Moore*, 81 Fla. 598, 88 So. 601; *Prudential Casualty Co. v. State*, 143 N. E. 631, 194 Ind. 542; *Hague v. Wateree Power Co.*, 112 S. E. 55, 119 S. C. 319; Cf. *I. C. C. v. Union Pacific R. R.*, 222 U. S. 541; *U. S. v. Curry*, 6. How. 106. See also *U. S. v. Young*, 94 U. S. 259, 24 L. Ed. 153; *Ex parte Vallendigham*, 1 Wall. 251; *Carroll v. Dorsey*, 20 How. 207; *Smith v. Currier*, 230 Fed. 805; *McDaniell v. Strand*, 105 Fed. 488; *City of Waxahachie v. Caler*, 92 Fed. 285; *Wholesale Grocers' Assn. of El Paso, Texas v. Federal Trade Commission*, 277 Fed. 657; *Cosper v. Gold*, 34 App. D. C. 194; *Re Fullager*, 32 App. D. C. 222; see *Degge v. Hitchcock*, 229 U. S. 162.

license mandatory on the Commission when the grantee of a construction permit has fulfilled the conditions of the permit (unless some new cause or circumstance is shown to have arisen),<sup>28</sup> and in view of the fact that in several sections of the Act no mention is made of construction permits where logic requires that they be mentioned along with licenses,<sup>29</sup> it was possible to contend that the word "license" in Section 14 should be construed to include both license and construction permit, and that a decision revoking or cancelling a construction permit is an appealable order. This point does not seem to have been made by appellant, but since no construction permit had actually been issued to appellant, such a contention would probably not have been upheld.

*Appealable Decisions: Denials of Applications.* What constitutes the denial of an application so as to constitute an appealable decision? This question resembles, in most (but not all) respects, the question as to when the Commission must accord notice and hearing under Section 11.<sup>30</sup> Under the decisions date, only two propositions can be regarded as definitely settled.

First, it is not necessary that there be a denial of the application *in toto*. Construction permits and licenses are to be considered as consisting of a large number of essential features,<sup>31</sup> and an application for a permit (or license, or renewal of license, or modification of license) having certain terms and conditions is not to be considered granted by the issuance of an instrument having terms and conditions other than those applied for. This is clear from the decision in the *General Electric Company* case, where a renewal license authorized reduced hours of operation, and from a dictum in *White v. Federal Radio Commission*,<sup>32</sup> where a renewal license authorized reduced power. A number of cases now pending involve changes of frequency in renewal licenses imposed on stations by

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28. *Radio Prac. & Proc.*, pp. 176-177. The Commission has, at times, taken the opposite position. See, for example, its statement filed with the Court of Appeals in *WMAK Broadcasting System, Inc. v. Commission*, No. 5117, U. S. Daily, Dec. 23, 1929, Jan. 10, 1930.

29. *Radio Prac. & Proc.*, p. 160. See, for example, Sec. 5 (A) and (B), 9, 11, 12, 14 and 15. The omission to mention construction permits in these sections was probably an oversight due to the fact that the requirement of construction permits (Sec. 21) was added to the bill at a comparatively late date.

30. *Radio Prac. & Proc.*, pp. 163-168, 172-179.

31. *Ibid.*, p. 172.

32. 29 F. (2d) 113.

the Commission without notice or hearing.<sup>33</sup> Another case involves the right of the Commission to insert in a renewal license a condition not contained in the previous license, the condition being to the effect that if a proper applicant applied for appellant's channel for use in another specified zone, appellant's license would not be again renewed.<sup>34</sup> Another case involves the right of the Commission to accord, by a renewal license, reduced service area to appellant's station, by reason of the assignment of other stations to the same frequency at an insufficient geographical separation and by increasing the power of another station previously operating on that frequency.<sup>35</sup> Whether such cases come within the doctrine of the *General Electric Company* case must await the Court's decisions.

Secondly, it is not necessary, to furnish the basis of an appeal, that the Commission's decision be rendered after notice and hearing under Section 11. The appeal may be taken regardless of whether a hearing has been held,<sup>36</sup> and, presumably, regardless of whether a hearing is required to be held under Section 11.<sup>37</sup> The denial appealed from may result from action of the Commission pursuant to a general regulation, such as a new allocation or a general order establishing the basis for such an allocation.<sup>38</sup>

In addition, it is possible to forecast, with a fair degree of assurance, the eventual construction of Section 16 in a few other respects. Applications for the Commission's written consent to

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33. Among these are *The Courier-Journal Company and The Louisville Times Company v. Commission*, No. 5190 (U. S. Daily, April 22, 29, 1930), and *Westinghouse Electric & Manufacturing Co. v. Commission*, No. 5192 (U. S. Daily, April 25, 29, 1930). Other appeals raising the same point have been taken but were voluntarily dismissed at an early stage of the appeal as the result of a settlement of differences with the Commission. See *Triangle Broadcasters v. Commission*, No. 5092; *Victor C. Carlson v. Commission*, No. 5093, and *Fred C. Schoenwolf v. Commission*, No. 5094 (U. S. Daily, Nov. 12, Dec. 2, 1929). See also *Isle of Dreams Broadcasting Co. v. Commission* (U. S. Daily, Nov. 9, 1929).

34. *Westinghouse Electric & Manufacturing Co. v. Commission*, Nos. 5104, 5105 and 5150 (U. S. Daily, Nov. 20, 1929).

35. *The Journal Company v. Commission*, No. 5095 (U. S. Daily, Nov. 12, 1929). The same question is presented by suits for injunction now pending against the Commission, discussed under a later sub-heading.

36. *General Electric Company* case, *supra*.

37. It is not yet clear whether a hearing must be held under Sections 11 and 21 on applications for construction permit. See *Radio Prac. & Proc.*, pp. 176-177. Nor is it clear whether hearings must be held under Sec. 11 on applications which do not present the issue of "public interest, convenience or necessity," e. g., an application which on its face cannot be granted because of conflict with the provisions of the law (such as Secs. 12 or 13) or with regulations of the Commission. See *ibid.*, pp. 166-168.

38. *General Electric Company* case, *supra*. A similar situation appears to be presented in the *Courier-Journal Company* case, No. 5190, and the *Westinghouse* case, No. 5192, *supra*.

assignment of license under the second paragraph of Section 12 will probably be considered applications for modification of license.<sup>39</sup> The same may also be held with respect to applications to install automatic frequency control or increased modulation,<sup>40</sup> applications for special authorization to engage in television and picture broadcasting in the broadcast band by existing broadcasting stations, and other miscellaneous applications of a similar nature.<sup>41</sup> Under the *Richmond Development Corporation* case,<sup>42</sup> applications for extension of date of completion and possibly also applications for other modification of construction permit, will be considered as applications for construction permit.

Other than the foregoing, the law is in a confused and unsatisfactory state, due primarily to the failure of Congress to establish a procedure which would accommodate itself to the peculiar situations which arise if the licensing of radio stations is to be made a quasi-judicial matter.

Consider, first, the practice followed by the Commission in dealing with applications for broadcasting privileges in the broadcast band, where, under the regulations of the Commission now in force,<sup>43</sup> there are a total of ninety channels available for use by broadcasting stations in the United States. On these ninety channels there is already a chaotic congestion of 615 stations,<sup>44</sup> and the Commission from time to time authorizes the construction of new stations. Whenever an application is made proposing to establish a new broadcasting station, or whenever an existing station applies for an improved assignment (a better channel, more power, increased hours of operation, etc.), the applicant is required to designate the frequency of the channel desired, and the Commission, if it designates the application for hearing,<sup>45</sup> notifies all existing stations on that and

39. *Radio Prac. & Proc.*, p. 159. It is not clear, however, what will be held with regard to applications for the Commission's approval of assignment of construction permit under Sec. 21.

40. The Commission is now applying the clumsy provisions of Sec. 21 to such situations and is requiring a construction permit for such situations, with much unnecessary hardship and annoyance to broadcasters. An application for modification should be sufficient to cover such changes.

41. See *Commission's 3rd Ann. Rep.*, pp. 67-68.

42. 35 F. (2d) 883.

43. See General Order 40 of Aug. 30, 1928, 2nd Ann. Rep., pp. 48-49.

44. See *Radio Prac. & Proc.*, pp. 145-146.

45. All too frequently, however, the Commission has granted such an application, particularly on regional and local channels (and also daytime or limited time positions on cleared channels), without giving notice or hearing to stations already assigned to such channels. In some cases, particularly in cases of existing stations clamoring for better assignments without filing applications for any specific channel, the Commission has given such stations improved assignments without any application therefor before it, and thus

on neighboring channels, which would be adversely affected by granting the application. This procedure, which seemed to have been held not legitimate in the *General Electric Company* case, was expressly upheld and approved in later decisions.

In *Chicago Federation of Labor v. Commission*,<sup>46</sup> the Court of Appeals said:

"The appellant complains of the procedure adopted by the Commission in hearing its application. It is assigned as error that the Commission required appellant to designate a single frequency in its application for modification of its license, whereby the proceeding was virtually converted into a contest with stations WBBM and KFAB as to the use of that frequency.

"In our opinion this procedure was not erroneous. Under Section 4 (f) of the Radio Act of 1927, the Commission is authorized to make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of the Act.<sup>47</sup> It is necessary that when a broadcasting station applies for the assignment of some other frequency to take the place of that already allotted to it, the station shall first determine what frequency it desires to apply for, and shall specify it in its application, in order that the Commission may be advised of the exact force and effect of the application. The number of available broadcasting frequencies is limited, and they are so interrelated that none can be considered wholly without reference to others. It is necessary in the interests of justice that if new allotments are to be considered which may substantially affect those already granted to other stations, the latter should be notified and be permitted to intervene in the proceeding. The record in the present case exemplifies this statement."<sup>48</sup>

has itself disregarded the very requirement it usually imposes on applicants, i. e., that of specifying the channel requested. In order to accommodate such stations, the Commission has several times made shifts of a dozen or more other stations without notice or hearing and without any application for it. See the discussion in connection with "reallocations" below.

46. Not yet reported, U. S. Daily, May 9, 1930.

47. In support of the conclusion, which is manifestly sound, may also be cited Secs. 10 and 21 which virtually require an applicant for license or construction permit to specify the frequency, power and hours of operation desired, and Sec. 11 which provides that the Commission "shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

48. Appellant (WCFL, the Labor Station in Chicago), operating on a daytime assignment on 970 kc., 5th Zone cleared channel, had applied for full time on 770 kc., a 4th Zone cleared channel on which WBBM of Chicago and KFAB of Lincoln, Neb., were dividing time, and an extensive hearing was held by the Commission on the application. Later, having denied the application and while the appeal was pending, the Commission suddenly, and without notice or hearing to any of the stations concerned, shifted a dozen or more stations so as to give WCFL full time on 1280 kc., a regional channel, U. S. Daily, Nov. 4, 11, 1929. This was the occasion for immediate appeals by three of the stations affected. See footnote 33, *supra*. Within 30 days, because of mutual interference between WCFL and a station at Chattanooga, Tenn., WCFL was asking to be restored to its former assignment. U. S. Daily, Dec. 19, 1929. Thereafter, by arrangement with a Seattle sta-

By implication the procedure was previously approved by the Court in other cases.<sup>49</sup>

Under Section 5 of the Amendatory Act of March 28, 1928, and Section 3 of the Amendatory Act of March 4, 1929, the Commission has been prohibited from issuing broadcasting licenses for a period of over three months and from issuing licenses for other kinds of stations for a period of over one year.<sup>50</sup> It has been customary for all broadcasting station licenses to run concurrently, with common expiration dates. This, of course, is not necessary under the Act, and is not the practice with regard to other kinds of radio stations. It is only infrequently that the Commission has made changes in a station's assignment *during* a license period; the changes have usually been ordered to take effect at the common expiration date of the licenses.<sup>51</sup> This has been possible because of the short license period (and has kept broadcasters in a state of turmoil ever since the Commission was first established).

Having the Commission's procedure in mind, let us examine a few of the difficult situations which arise with reference to the right of appeal. Take first the case where Station A, either as the result of the application of Station B and hearing thereon, or arbitrarily without application by another and without notice or hearing, is subjected to a modification of license *during* its license period. This clearly is not a denial of any conceivable application by Station A. In the writer's opinion it may be considered, however, as a *revocation* of license and therefore appealable.<sup>52</sup>

Next take the case where, as the result of an application by Station B for Station A's frequency and a hearing in which both stations participate, Station B's application is granted and, at the end of the license period a license is issued to Station B for the frequency in question and a license is issued to Station A for a less desirable frequency. The action of the Commission has a double

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tion assigned regularly to 970 kc., the Commission (the appeal still pending) authorized WCFL to operate daily until 2 hours after sunset on the Pacific Coast. WCFL is now endeavoring to have Congress adopt a joint resolution requiring the Commission to provide three cleared channels for the exclusive use of labor, agriculture, and the Department of Interior, respectively.

49. *Great Lakes Broadcasting Co. v. Commission*, 37 F. (2d) 993, 995; *City of New York v. Commission*, 36 F. (2d) 115, 117.

50. This limitation expires on December 31, 1930, and the three and five-year limitations originally prescribed by Sec. 9 will be restored into force, unless the Act is again amended.

51. An important exception to this has been in cases where without disturbing the assignments of existing stations, a new station has been assigned to a regional or local channel or to a daytime position on a cleared channel.

52. See next sub-heading.

complexion: it is in form a granting of Station B's application, and in substance also a denial of Station A's application for renewal of license. But the hearing was not held on Station A's application for renewal, which need not be filed until thirty days before the beginning of the next license period,<sup>52a</sup> and may not (and usually is not) on file when the hearing is held and the decision made. No evidence has, therefore, been heard in support of or opposing Station A's application for renewal, and, therefore, if Section 16 be strictly interpreted, the evidence heard with reference to Station B's application has no place in the record transmitted to the Court by the Commission<sup>53</sup> if Station A appeals from a denial of its renewal application at the end of the license period. Such a situation might have arisen in either the *Chicago Federation of Labor* case or the *City of New York* case,<sup>54</sup> if the applications for modification had been granted instead of being denied.

An interesting variation on the foregoing is furnished by the case of *Great Lakes Broadcasting Co. v. Commission*.<sup>55</sup> WLS and WENR, two Chicago stations, were dividing time on 870 kc., a Fourth Zone cleared channel, WLS having 5/7 of the time and WENR having 2/7 of the time.<sup>56</sup> WENR applied for modification of its license to increase its hours of operation from 2/7 to full time, or to at least half time. More as a measure of protection than otherwise, WLS applied for modification to increase its hours of operation to full time. To further complicate matters, WCBD, of Zion City, Illinois, applied for time on the channel. The three applications were heard together by the Commission and, by a divided Commission, all three were denied. All three applicants appealed. The Court of Appeals upheld the Commission in its denial of WCBD's application but reversed the Commission otherwise by

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52a. See General Order 89, U. S. Daily, April 22, 1930.

53. In such a situation it is, of course, possible for the Commission to see to it that the hearing is held with reference to Station A's application for renewal as well as Station B's application for modification.

54. 36 F. (2d) 115. The same situation is presented in *WMAK Broadcasting System, Inc. v. Commission*, No. 5117, and *Onandaga Company v. Commission*, No. 5125. The situation also arose in *Northwest Broadcasting System, Inc. v. Commission*, No. 5112, but the appeal was voluntarily dismissed under a settlement by which the Commission agreed to hold another hearing, which will be held in Seattle on July 10, 1930.

55. 37 F. (2d) 993.

56. This was under the allocation of Nov. 11, 1928. Prior to that date, WLS had divided time with WCBD on that channel and WENR had had full time (but less power) on another channel. The case really arose out of the allocation of Nov. 11, 1928; the stations, however, followed the procedure laid down by the Commission instead of ignoring it, as did WGY in the *General Electric Company* case.



awarding WENR half time at the expense of WLS. On appeal WLS contended earnestly that the three appeals must be considered separately and that, on an appeal by WENR, nothing could be taken from WLS which was not a party to that appeal. The Court, however, viewed the three applications as representing

"competitive claims of the three appellant broadcasting stations for operating time on the same broadcasting channel."

without passing on the specific point raised by WLS. What would have happened if WLS had not appealed and subjected itself to the Court's jurisdiction, is not clear. Nor is it clear what kind of a decision would have been the basis for appeal if the Commission had *granted* the application of any one of the three applicants, with consequent injury to one or both of the other applicants.<sup>57</sup>

Consider next the situation presented by what are known as the Short Wave Appeals.<sup>58</sup> In the fall of 1928, there were open for assignment a limited number of domestic high frequency channels<sup>59</sup> for point-to-point wireless telegraphy, and applications were pending before the Commission involving many times the total available. The exact number of channels available, although known approximately, could not be known exactly because of the fact that negotiations were pending between the United States, Canada and other North American nations, for an allocation of these channels among them; for the same reason, the exact frequencies which would be ultimately available to the United States could not be known. The Commission held hearings on the applications during the fall of 1928. On December 22, 1928, it granted applications for construction permits<sup>60</sup> to two of the applicants covering all but a few of the available channels, leaving only sufficient to constitute a safe margin for the pending international negotiations; in actual figures, including about six channels which were already in use, it thus disposed of about 66 channels, but did not specify the channels by frequency. The North American Agreement<sup>61</sup> was thereafter concluded and became effective on March 1, 1929. It developed that under this agreement there remained

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57. See footnote 6, *supra*.

58. See footnote 16, *supra*.

59. In the band 1500-6000 kc. See 1929 Radio Com. Rep., pp. 411-436 for an exposition of the scientific factors involved.

60. In order to avoid unnecessary complication, the above account is simplified by omitting mention of other considerations which are raised in the cases. The Commission's Statement of Grounds on the *Short Wave Appeals* is available at the Govt. Pr. Off., as *Intercity Radio Telegraph Co. v. Commission*, and contains a comprehensive review of the facts involved in the cases, as well as an informative series of documents attached as exhibits.

61. Govt. Pr. Off. Treaty Series, No. 777-A.

only 22 channels to be disposed of, a number which was insufficient to meet the demands incorporated in the applications of any one of three important applicants, not to mention all three of them together or the many other less important applicants. The Commission held further hearings on the applications of these three applicants<sup>62</sup> (as well as certain others), and on June 7-10, 1929, granted to one of them construction permits covering virtually all the remaining channels (which were considerably less than the number the applicant applied for), and denied all the applications of the other two. At about the same time it made public the precise frequencies constituting forty of the channels covered by its action of December 22, 1928, and on June 20, 1929, it made public the other twenty. As a result of the Commission's actions all but one of the total number of available channels were disposed of. All three of the applicants (including the one part of whose applications were granted) appealed, and, as part of their complaint at the denial of their applications, attacked to a greater or less degree, the Commission's actions of December 22, 1928, and June, 1929, *granting* the applications of others. Thus, the cases raise such questions as (1) whether, under the foregoing facts, the Commission's action of December 22, 1928, constituted a denial of appellants' applications (for, if so, then an appeal should have been noted within twenty days thereafter), and (2) whether the Commission's actions in June, 1929, *granting* or otherwise acting on the applications of *others* may be considered as refusals of appellants' applications, or in connection with appeals from the formal refusals of appellants' applications. The writer refrains from expressing any opinion on these questions, and mentions them only as eloquent illustrations of the inadequacy of Section 16. Analogous situations constantly occur in the broadcast band where, with several applications pending for assignment to the same channel, one of the applications is heard and granted, or a station which has filed no such application is, without notice or hearing, assigned to the channel which the applicants are seeking.

Consider, thirdly, the situation where, on an application for renewal which has been designated for hearing, the Commission fails or refuses to hold a hearing until after the expiration of the existing license, and refuses to grant the station any temporary authorization to operate in the interim. This action, which seems arbitrary and

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62. Because of their tentative merger, Intercity Radio Telegraph Company and Wireless Telegraph & Communications Company are spoken of as one applicant.

unduly harsh, has been taken from time to time recently.<sup>63</sup> May the application for renewal be considered as having been denied at the expiration of the license period?

Consider, fourthly, the case where, instead of granting a renewal application duly filed, the Commission "extends" the existing license for a temporary period for one reason or another, sometimes as a disciplinary measure in the nature of a period of probation.<sup>63a</sup> No specific authority is given by the Radio Act to "extend" licenses as distinguished from renewing them, but extensions have been virtually an administrative necessity because of the short license period. Is such an extension to be considered as a denial of the application for renewal? The extension, particularly when for a short period (*e. g.*, 30 days) is not a *renewal* of a three months license. If, in addition, the extension places the licensee under probation, it contains conditions not contained in the license sought to be renewed.

*Appealable Decisions: Revocations of License.* There have been no out-and-out revocations of license by the Commission, because of difficulties created by the short license period. Disciplinary action has usually been administered in connection with renewal applications.<sup>63b</sup>

One problem which may arise is in case the Commission suspends a license. Section 14 gives power to *revoke* for causes specified in the section, after notice and hearing, the revocation not to become effective until the conclusion of the hearing. In isolated cases the Commission has *suspended* licenses without notice or hearing. The law is not clear as to whether the power to revoke implies the lesser power to suspend (the writer is inclined to think

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63. It was taken with regard to WCHI of Chicago at the end of the license period expiring April 30, 1930. It seems likely to occur frequently in the future if the Commission attempts to give effect to its General Order 89, which requires renewal applications to be filed 30 days or more prior to the expiration date and forbids stations to operate during the interim between the expiration date and the date of action upon any renewal applications not filed within the prescribed period.

63a. See 2nd Ann. Rep., pp. 159, 161; case of KWKH, Shreveport, La., U. S. Daily, Feb. 22, 1930. Also see U. S. Daily, April 25, 1930.

63b. See the recent action of the Commission in refusing, after hearing, to renew the license of KVEP, Portland, Ore., because of "profanity, obscenity, and villification of particular individuals" (U. S. Daily, May 31, 1930). See also its refusal of the renewal application of KFKB, Milford, Kans., for alleged broadcasting of quack medical advertising (U. S. Daily, June 14, 1930). Both stations appealed. See also U. S. Daily, Feb. 20, 22, 1930, and 2nd Ann. Rep., pp. 152-170.

that it does),<sup>64</sup> but, if it does, the procedure prescribed by Section 14 should be followed. May a licensee whose license is suspended appeal under Section 16? In other words, does "decision of revocation" include suspension of license? This is a somewhat different question than that raised by Section 14 and, under the principles of statutory construction by the Court in *Universal Service Wireless, Inc. v. Commission*,<sup>65</sup> the writer believes that no appeal would lie.

It may be assumed that adverse action by the Commission effective at the end of a license period is not a revocation,<sup>66</sup> and must be considered as action upon a renewal application, if any is on file.

Attention has already been called to the possibility of considering a modification of license *during* a license period as a revocation of license. It is on this theory that an appeal is now pending in the United States District Court in Connecticut.<sup>67</sup> Since this proceeding is part of one of the most interesting and tangled juridical situations which have arisen in radio regulation, the facts that constitute the basis of the appeal will be briefly recounted. Station WGBS, of New York City, was assigned to operate on 600 kc. by the Commission a short period before that in which we are interested. With the merits of the opposing claims of the Commission and WGBS (as to whether the assignment to 600 kc. was conditional, etc.) we need not be concerned. The Commission set WGBS's renewal application for hearing simultaneously with a hearing on an application for modification of WICC, of Bridgeport, Connecticut, to be assigned to 600 kc. The hearing was held on February 28, 1930.<sup>68</sup> On April 21, 1930, the Commission denied WGBS's renewal application, and granted WICC's application for modification.<sup>69</sup> The common license period expired on April 30,

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64. A hasty search of the authorities by the writer reveals no case in point. During the period when the writer was general counsel for the Commission, his first assistant, Mr. Donald D. Hughes (since deceased), rendered an opinion to the effect that the power to revoke does not imply the power to suspend.

65. See footnotes 24-27, *supra*.

66. Two early appeals from decisions of the Commission proceeded upon this theory, having been taken to district courts of the United States; both were voluntarily dismissed. One of them was *Reynolds Radio Company v. Commission* No. 8597, U. S. D. C., D. of Col., Jan. 9, 1928. This citation was furnished the writer by Messrs. B. M. Webster, Jr., formerly General Counsel of the Commission, and Paul M. Segal, formerly Assistant General Counsel. The writer does not have the citation of the other case.

67. *Bridgeport Broadcasting Station, Inc. v. Commission*, appeal filed May 9, 1930.

68. U. S. Daily, Feb. 28, 1930.

69. *Ibid.*, April 22, 1930.

1930. On April 25th, WGBS appealed to the Court of Appeals,<sup>70</sup> and on April 26th, without notice to the Commission, obtained a stay order from that Court which, in substance, required the Commission to preserve the *status quo* pending the appeal.<sup>71</sup> Before the stay order was served on the Commission, however, the Commission had delivered to the Department of Commerce (for delivery to WICC) a license authorizing WICC to operate on 600 kc. for the period commencing April 30, 1930. By a vote of 3 to 2 the Commission decided that it had no authority to recall the license, and it was duly delivered to WICC. The Department of Commerce thereupon delivered the license. Beginning with April 30, 1930, both WGBS and WICC operated simultaneously on 600 kc. and, since they are only 50 miles apart, caused ruinous interference to each other. WICC brought suit in the United States District Court in New York City to restrain WGBS from operating on 600 kc. and in the same suit asked for \$50,000 damages; this suit was later withdrawn. On May 6, 1930 WGBS filed a petition in the Court of Appeals asking that the Commission be cited for contempt and that it be ordered to recall the license issued to WICC.<sup>72</sup> On May 7, 1930, the Court entered the order, but did not cite the Commission.<sup>73</sup> The Commission, in compliance with the order, attempted to recall WICC's license and to substitute authority to it to operate on its former channel. On May 9, 1930, WICC appealed to the United States District Court in Connecticut on the theory that this action of the Commission constituted a revocation of license, and shortly thereafter secured a stay order from that Court requiring the Commission to permit WICC to continue operating on 600 kc.<sup>74</sup> On May 13, 1930, WGBS filed a petition with the Commission alleging that WICC was still operating on 600 kc. and demanding that the Commission take steps to make WICC cease such operation.<sup>75</sup> WGBS also went into the United States District Court in Connecticut with a bill for injunction against WICC, setting up, *inter alia* the unconstitutionality of Section 16 in so far as it permits an appeal to district courts of the United States, and on May 16, 1930, the same judge who granted WICC a stay order granted WGBS a temporary restraining order forbidding WICC to operate on 600

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70. *General Broadcasting System, Inc. v. Commission*, No. 5196. *Ibid.*, April 26, 1930.

71. *Ibid.*, April 29, 1930.

72. *Ibid.*, May 7, 1930.

73. *Ibid.*, May 8, 1930.

74. *Ibid.*, May 12, 17, 1930.

75. *Ibid.*, May 15, 1930.

kc.<sup>76</sup> About the same time the Commission filed a motion to dismiss WICC's appeal.<sup>77</sup> In the meantime, WMCA, a New York station operating on 570 kc. filed a petition to intervene in WGBS's appeal in the Court of Appeals.<sup>78</sup> There the matter stands at the time this article is written.

*Appealable Decisions: Reallocations.* For the sake of simplicity, discussion under this heading will be confined to reallocations of broadcasting stations, although analogous situations will occasionally arise outside the broadcast band.

In advance, it may be stated that in the writer's opinion, no reallocation, no matter how much needed or how well founded as a matter of radio engineering principles, can justify unfavorable action upon a renewal application of a station adversely affected, without *prior* notice and hearing (either under Section 11 or by necessary implication from Section 4(f) in the light of fundamental requirements of due process of law). This seems to be settled by the *General Electric Company* case.<sup>79</sup> Consequently, not much can be said under this heading which has not already been covered in principle. A word may profitably be said, however, in comparing the three major cases of reallocation which have taken place.

In making its first reallocation, effective June 15, 1927, the Commission assumed that Section 4(f) gave it power to make changes in the assignments of broadcasting stations without prior notice and hearing.<sup>80</sup> Consequently, the reallocation was put into effect, and *thereafter* stations dissatisfied with their assignments were permitted to apply for better assignments and to be heard. Suit was immediately brought against the Commissioners in the Supreme Court of the District of Columbia on June 15, 1927, by the Madison

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76. *Ibid.*, May 17, 1930.

77. *Ibid.*

78. *Ibid.*, May 10, 1930.

79. 31 F. (2d) 630.

80. Sec. 4 reads as follows: "Except as otherwise provided in this Act, the commission, from time to time, as public convenience, interest, or necessity requires, shall—

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(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the wave lengths, authorized power, in the character of emitted signals, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, in the judgment of the commission, such changes will promote public convenience or interest or will serve public necessity or the provisions of this Act will be more fully complied with;"

Square Garden Broadcast Association (WMSG),<sup>81</sup> attempting to restrain the reallocation and alleging the unconstitutionality of the Radio Act of 1927. This suit was later withdrawn.<sup>82</sup> On June 22, 1927, the International Broadcasting Corporation (WGL) appealed from the Commission's action, claiming a property right in its former assignment and attacking the constitutionality of the Radio Act.<sup>83</sup> The Commission immediately filed its statement of grounds for decision in which it justified its action expressly on Section 4(f) of the Act.<sup>84</sup> This appeal was later dismissed voluntarily.<sup>85</sup> On July 12, 1927, the People's Pulpit Association (WBBR), having been unsuccessful in a hearing in which it had sought WJZ's assignment, appealed to the Court of Appeals,<sup>86</sup> not questioning the validity of the Act but charging a confiscation of its property by the Commission. The Commission filed a statement of grounds for decision, again justifying its action under Section 4(f).<sup>87</sup> This appeal was also voluntarily dismissed. Consequently the legal sufficiency of the Commission's procedure was not subjected to judicial review.

It is not easy to determine what was the precise intention of Congress in enacting Section 4(f).<sup>88</sup> The maximum license period prescribed in Section 9 of the Act, as then in force, was for three and five years, for broadcasting and other stations respectively, and probably the drafters of the Act wanted to cover the case where, in order to make possible the adoption and enforcement of regulations for the prevention of interference, some changes in station assignments *during* a license period might become necessary. There was nothing in the Act requiring that broadcasting station licenses run concurrently with a common expiration date. Even if Section

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81. U. S. Daily, June 16, 1927.

82. The argument was postponed, and the plaintiff on June 22, 1927, entered into a stipulation to abide by the results of the appeal taken by International Broadcasting Corporation (U. S. Daily, June 17, 18, 20, 22 and 23, 1927). The suit was thereafter dismissed voluntarily.

83. *International Broadcasting Corporation v. Commission*, No. 4614. U. S. Daily, June 23, 1927.

84. *Ibid.*

85. *Ibid.*, Aug. 3, 1927.

86. *People's Pulpit Association v. Commission*, No. 4619, U. S. Daily, July 13, 1927. Notice of appeal set forth in *ibid.*, July 14, 1927. Appellant made this first request for a stay order (or temporary injunction); it was denied.

87. U. S. Daily, Aug. 1, 1927.

88. Perhaps also Congress had in mind changes which might become necessary by reason of amendment to the law or the provisions of international treaty. What will happen to the right of appeal in the case of such changes is difficult to forecast. At least, the station affected should have the right to question by appeal the validity and proper construction of the amendment or treaty provision which deprives it of rights it has previously enjoyed.

4(f) be given a construction authorizing such changes *during* a license period, the reference to "public convenience or interest" and "public necessity," in view of Section 11, seem to imply notice and hearing;<sup>88a</sup> in any event, the changes should be necessitated by *regulations* "to prevent interference between stations and to carry out the provisions of this Act." Congress did not intend changes consisting simply in supplanting one station with another for reasons having nothing to do with any regulations, nor, in the writer's opinion, did it intend that changes might be made without notice and opportunity for hearing, where the station does not consent. Consequently, the broad position taken by the Commission on the first two appeals cannot be justified.<sup>89</sup>

The second, and most far-reaching reallocation, was that which became effective on November 11, 1928, by which the assignments of 94% of all broadcasting stations were changed. This was preceded by action in the nature of a general regulation (General Order 40 of August 30, 1928) and by opportunity for hearing to all dissatisfied stations *prior* to the effective date of the reallocation (which was also the common expiration date of their licenses). This reallocation has already been sufficiently discussed elsewhere.<sup>90</sup> Under the decisions this procedure seems sufficiently to comply with the law.

In the fall of 1929, there occurred a series of shifts of stations, involving only a limited number of stations. In most cases the shifts were primarily for the sake of bettering the assignments of particular stations, but the result in each case was merely to transfer trouble to other stations. These shifts, with one exception, were without prior notice and hearing, and caused a series of appeals and widespread complaint.<sup>91</sup>

The third and most recent reallocation involved a shift of some twenty-six stations back and forth on thirteen cleared channels. It was first devised and announced in the winter of 1930<sup>92</sup> and an attempt was made to secure the consent of the stations affected. Most of the stations were not substantially affected and gave their

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88a. It is possible to construe the statute as not necessarily requiring the procedure specified by Section 11 with respect to notice and hearing, but as merely requiring sufficient prior notice and hearing of the proposed changes to meet the elementary essentials of due process of law.

89. There was a third early appeal, *Harold E. Smith v. Commission*, No. 4674, Nov. 21, 1927.

90. *Radio Prac. & Proc.*, pp. 154-155. See also text, *supra*, under heading "Appealable Decisions—Denials of Applications."

91. U. S. Daily, Nov. 4, 11, 1929; Jan. 27, 28, 1930; Feb. 14, 1930.

92. *Ibid.*, Feb. 13, 1930.



consents. The justification claimed for the shift was that it increased the average geographical separation between stations on adjacent channels, but one outstanding fact was that out of the shuffle WCAU, of Philadelphia, which had been complaining of its assignment on a relatively inferior channel (1170 kc.) emerged with the very excellent channel (820 kc.) theretofore used by WHAS, of Louisville, Kentucky, and the latter station was to be relegated to an inferior channel (1020 kc.). Another outstanding fact was that WHAM, Rochester, New York, on the cleared channel of 1160 kc., was to be shifted to 1170 kc. where KTNT, at Muscatine, Iowa, which was enjoying "limited time" operation (during daylight only) with 5 kilowatts power, had been causing interference to WCAU. A third outstanding fact was that KYW, Chicago, on a cleared channel (1020 kc.) was to receive a still less desirable channel (1140 kc.) and was to be subjected to the same condition in its license about which it was already complaining in three pending appeals.

On April 7, 1930, the Commission adopted its General Order 87 amending General Order 40 so as to permit the shift in cleared channel assignments, and, on the same date, acted upon the applications for renewal of the stations affected by "granting" the applications in accordance with the new assignments, effective on April 30, 1930.<sup>93</sup> The action was not made public until April 14, 1930. The Commission provided that any station dissatisfied with its assignment might have a hearing on *June 17, 1930*, if it signified its desire for hearing within a certain specified period. Out of this action arose two appeals and a suit for injunction. On April 21, 1930, WHAS appealed to the Court of Appeals and on April 26th obtained a stay order restraining the Commission from making the proposed change in its assignment.<sup>94</sup> A day or two later KYW also appealed and on April 26, 1930, obtained a stay order couched in the broadest terms, restraining the Commission not only from making the proposed change in its assignment but also from holding any hearings with regard to the channel of 1020 kc., on which it was then operating.<sup>95</sup> On April 24, 1930, WHAM, having chosen a different route and having instituted suit for injunction in the Supreme Court of the District of Columbia against the Commissioners, obtained a temporary restraining order forbidding the Com-

93. *Ibid.*, April 8, 16, 17, 1930.

94. *Courier-Journal Company and Louisville Times Company v. Commission*, No. 5190. U. S. Daily, April 22, 29, 1930.

95. *Westinghouse Elec. & Mfg. Co. v. Commission*, No. 5192. U. S. Daily, April 25, 29, 1930.

mission to change its assignment or to assign any other station to its channel.<sup>96</sup>

On April 28, 1930, the Commission adopted an amendment to its General Order 87, postponing the effective date of the changes from April 30, 1930, to July 31, 1930, and providing that the hearings scheduled for June 17, 1930, should take place on that date and that

"all stations affected by the said order and desiring to be heard shall show cause at that time why said frequencies should not be changed in accordance with the provisions of General Order No. 87 and the action of the Commission dated April 7, 1930."<sup>97</sup>

On May 16, 1930, because the stay order in the KYW case and the temporary injunction in the WHAM case effectually prevented any hearings, the Commission adopted a further amendment to General Order 87 indefinitely postponing both the effective date of the changes and the scheduled hearing during the pendency of the cases or until the stay order and restraining order were dissolved or modified.<sup>98</sup>

In argument on the WHAM case, counsel for the Commission contended that "petitioner is barred from relief . . . since an adequate legal remedy is provided by the Radio Act of 1927," and stated in their brief

"That appellant will have a right to appeal is clearly indicated by the decision of the Court of Appeals in the District of Columbia in the case of *General Electric Company v. Federal Radio Commission*."

In the WHAS and KYW cases, counsel for the Commission filed motions to dismiss the appeals urging

"This Court has no jurisdiction to hear or entertain said appeal. The decision complained of is a general regulation designated General Order 87 of the Commission promulgated pursuant to Section 4 (f) of the Radio Act of 1927 as amended."

In a situation closely resembling the WHAM case, on an appeal now pending where complaint was made of the assignment of other stations to appellant's channel without notice or hearing, counsel for the Commission are urging by motion to dismiss and in their briefs that no appeal lies.<sup>99</sup> The inconsistency is obvious.

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96. *Stromberg-Carlson Telephone Mfg. Co. v. Chas. McK. Saltzman, et al.*, as the *Federal Radio Commission*, in equity No. 51325.

97. U. S. Daily, April 26, 1930.

98. *Ibid.*, May 17, 19, 1930.

99. *Journal Company v. Commission*, No. 5095.

Upon the outcome of the appeals in the WHAS and KYW cases, depend the answers to two important questions which are not yet settled: (1) whether the Commission, acting under Section 4(f), or otherwise, has power to make changes in a station's assignment at the end of a license period without *prior* notice and opportunity for hearing and (2) whether the making of such changes, accompanied by the empty privilege of a hearing *after* the changes go into effect, is an appealable decision on pending applications for renewal, prior to the hearing and decision thereon.

*Appealable Decisions: Regulations.* No appeal lies under Section 16 from a regulation as such, as distinguished from actions on particular applications pending before the Commission. It is possible, however, that an action of the Commission may take the form of a regulation and at the same time constitute a denial of a pending application. This was virtually the case presented in *Carrell v. Commission*.<sup>100</sup> By its General Order 30 of May 10, 1928, the Commission directed that after July 1, 1928, "all portable broadcasting stations will cease operations." On appeal the regulation was attacked by the owner of several portable stations which had been forced to discontinue, and was passed upon and upheld by the Court.

It was partly the case in *General Electric Company v. Commission*, in which the Court of Appeals took the effective date of the reallocation of November 11, 1928 (under General Order 40) to be the effective date of the Commission's decision, as distinguished from the actual date of the Commission's action upon the application for renewal (which was October 12, 1928).

Section 16, therefore, differs from Section 5 covering appeals from the Secretary of Commerce to the Commission; the latter section provided that such appeals might be taken from "any decision, determination or regulation of the Secretary of Commerce."<sup>101</sup>

As has been pointed out elsewhere,<sup>102</sup> there is no reason why regulations of the Commission should not be questioned, passed upon, and upheld or set aside by the Court of Appeals in proper cases where the Commission's decisions on particular applications result

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100. 36 F. (2d) 117.

101. In view of amendment to the Radio Act of 1927 continuing the Commission as the licensing authority, and of the likelihood that S. J. Res. 176, transferring the Radio Division of the Department of Commerce to the Commission, seems likely to pass, the appeal provisions of Sec. 5 will probably never be given effect.

102. *Radio Prac. & Proc.*, pp. 153-156.

from such regulations. The Court of Appeals, in view of its broad administrative function, probably has power to determine whether or not a regulation meets the test of "public interest, convenience or necessity," the standard which must be followed by the Commission in adopting regulations under Section 4. While the statute does not give the Court of Appeals authority itself to adopt other regulations its power may be said to resemble that of judicial tribunals in passing on the validity of rates prescribed by rate-making tribunals; new rates may not be prescribed but the limits which must be observed if confiscation is to be avoided may be pointed out, and the principles for determining valid rates may be established. In analogous fashion the standard of "public interest, convenience or necessity" may achieve a more definite meaning.

Where, because of conflict with some regulation, the Commission denies an application without hearing, such a decision may be regarded as similar to a judgment rendered on pleadings. An appeal should be permitted to the applicant, and on appeal he should have the right to question the regulation which prevented him from being accorded a hearing under Section 11. The Court of Appeals should be considered as having power to pass on the regulation and, if it finds the regulation valid and sufficient under the test of public interest, convenience or necessity, should uphold the Commission's decision. If the Court finds that the regulation is invalid or that it fails to meet the test, the Court should remand the case to the Commission for hearing. It should not, in the writer's opinion, attempt to grant the application on a record which contains no evidence in support of, or in opposition to, the application on the issues of fact raised by it. The application, though sworn to, is an *ex parte* document; investigation and hearing may disclose that its contents are untrue or exaggerated, or that there are reasons in fact for refusing the application. In the *General Electric Company* case, however, the Court's judgment required the Commission to grant an application in a case where the application was on its face inconsistent with a regulation of the Commission (General Order 40) and had consequently been denied without hearing by the Commission.<sup>103</sup>

*Persons entitled to appeal:* When it has been determined what are, and what are not, appealable decisions, an answer has been given to the question as to what persons are entitled to appeal. As may be seen from previous sub-headings, there are several difficult problems as to what constitutes a denial of any of the four classes of applica-

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103. See case comments in Harv. L. Rev., Vol. 42, p. 948; Mich. L. Rev., Vol. 28, p. 194.

tions specified in Section 16. There is no difficult problem, however, as to who may appeal, once an action of the Commission has been found to constitute a denial. Only the denied applicant has this right, no one else.<sup>104</sup> Similarly, in cases of revocation of license, only the licensee whose license is revoked may appeal. The failure of the statute to make provision for appeal by parties respondent to the application in the proceedings before the Commission (so that, if the application is granted, any respondent who is aggrieved thereby may appeal, and, if it is denied and the applicant appeals, the respondent may take part in the appeal as an appellee) is one of the most vital defects in the entire Radio Act of 1927, and is in large measure the basis for the claim of invalidity now being urged against it.<sup>105</sup>

*Intervention:* In several cases, all of them involving broadcasting stations, the Court of Appeals has granted petitions to intervene filed in behalf of stations which were parties respondent to the hearings before the Commission, and has specifically given such intervenors the status of appellees. This was done in *Chicago Federation of Labor v. Commission*,<sup>106</sup> on the petition of the owners of Station WBBM, the channel assigned to which was applied for by appellant. WBBM was given all the full status of an appellee, and was permitted to file briefs and participate in the oral argument. It has also been done in other appeals now pending.<sup>107</sup> A different kind of intervention was effected in *Great Lakes Broadcasting Co. v. Commission*, consisting of an appeal by the successful respondent (Agricultural Broadcasting Company, WLS). The danger of pursuing this course is evidenced by the fact that the Court took jurisdiction to the extent of reducing the time of the respondent in favor of the appellant.

In the *Short Wave Cases*,<sup>108</sup> the Court denied a petition to intervene filed by Press Wireless, Inc., a grantee of permits and licenses,

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104. The failure of the Court of Appeals to grant the Commission's motion to dismiss the appeal of the State of New York in the *General Electric Company* case must be regarded as an unintentional slip, without significance as a precedent.

105. See footnote—above. Section 11, governing hearings by the Commission, likewise accords no right of notice or hearing to interested parties other than the applicant and may be subject to the same claim of invalidity as is being made against Section 16. See 1929 Radio Committee Reports, pp. 461-469, 475-476.

106. Not yet reported, U. S. Daily, May 9, 1930.

107. *WMAK Broadcasting System, Inc. (WMAK) v. Commission*, No. 5117 (the applicant before the Commission, whose application was granted was permitted to intervene); *Northwest Broadcasting System, Inc. (KJR) v. Commission*, No. 5112 (the successful applicant before the Commission was again permitted to intervene; the appeal has since been voluntarily dismissed).

108. See footnote 16, *supra*.

although certain of the appellants were attacking the Commission's decisions which resulted in the granting of the permits and licenses to the petitioner and claimed that they constituted a denial of appellants' applications, since, together with other decisions of the Commission, they disposed of all but one of the channels suitable for the services proposed by the applicants.<sup>109</sup> The Court's action is distinguishable, since the petition to intervene expressly reserved all rights to object to the jurisdiction of the Court to deprive it of privileges granted by the Commission. The Court did, however, accord the petitioner the status of *amicus curiae* and permitted it to file briefs within ten days after appellants filed their briefs.<sup>110</sup> The American Telephone & Telegraph Company, also interested in the subject matter of the case, was likewise given the status of *amicus curiae*, and filed briefs.<sup>111</sup>

*Scope of Court's Jurisdiction on Appeal:* The last paragraph of Section 16 provides:

"At the earliest convenient time the court shall hear, review, and determine the appeal upon said record and evidence, and may alter or revise the decision appealed from and enter such judgment as to it may seem just. The revision by the court shall be confined to the points set forth in the reasons of appeal."

The Supreme Court of the United States has held that Section 16 "does no more than make that court a superior and revising agency in the same field."<sup>112</sup>

In the *Short-Wave Appeals*, it is being urged before the Court of Appeals that Section 16, properly construed, does not confer power or jurisdiction upon that Court to enter any judgment adversely affecting any person not given the status of a party by that section, i.e., any person other than appellant or the Commission. In support of this contention, such arguments are advanced as that unless Section 16 be given the restricted construction, it is unconstitutional; that it must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score;<sup>113</sup> and that the language of the section supports the re-

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109. *Petition of Press Wireless, Inc.*, U. S. Daily, Mar. 27, 29, 31, April 2, 3, 1930.

110. *Ibid.*, April 3, 1930. Briefs were filed April 15, 1930. U. S. Daily, April 17, 1930.

111. U. S. Daily, April 30, 1930. Oral argument was postponed to the October term, *ibid.*, April 29, 1930.

112. *Federal Radio Commission v. General Electric Company*, Adv. Ops., 1929-1930, p. 514.

113. *U. S. v. Standard Brewery*, 251 U. S. 210; *Carey v. So. Dakota*, 250 U. S. 118; *Texas v. Eastern Texas R. Co.*, 258 U. S. 204.

stricted construction (e.g., no mention is made of anyone except appellant and the Commission; no provision is made for filing of any document by anyone else, while precise limitations are imposed on both appellant and the Commission in this regard; the record filed by the Commission must consist of "all papers and evidence presented to it upon the original application," *not* papers presented to it upon another's application; the privilege, upon certain conditions, of adducing additional evidence is expressly conferred upon "either party," not third parties; etc.). In reply it is urged that, if Section 16 be given the restricted construction, the right of appeal is worthless; that the broad construction must be adopted in order to give effect to the manifest intention of Congress that the Commission's actions on application be open to review by the Court of Appeals, etc. In rebuttal to the foregoing, it is argued that the oversights of Congress in failing to foresee the nature of controversies which would arise in radio regulation and in failing to provide a procedure suitable for their determination, cannot be remedied by judicial decision; that the appellate jurisdiction conferred upon the Court by Section 16 being statutory, the powers of the Court must be found expressly in the statute, etc.<sup>113a</sup>

There is nothing in the Court's decisions to date indicating what answer it will give to the question presented by the *Short-Wave Appeals*. None of its final judgments (as distinguished from its stay orders) has adversely affected a party not before the Court; in fact, it has reversed the Commission on only three occasions. In the first of the three, the *General Electric Company* case, the decision adversely affected KGO in Oakland, California, but KGO, as well as WGY, was owned by appellant and appellant was seeking the relief it was given. In the *Richmond Development Corporation* case,<sup>114</sup> no direct injury was caused to third parties, since the result was merely to require another extension for time of completion of a station for which a permit had previously been granted. In the *Great Lakes Broadcasting Co.* case,<sup>115</sup> the Company adversely affected by the judgment had voluntarily subjected itself to the Court's jurisdiction by itself appealing.

In *Sumner-Tacoma Stage Co. v. Department of Public*

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113a. *Sheldon v. Sill*, 8 How. 441; *Saltmarsh v. Tuthill*, 12 How. 387; *Carlin v. Goldberg*, 45 App. D. C. 540; *United States v. Curry*, 6 How. 106; *Minn. & St. Louis R. R. Co. v. Board of R. Commrs.*, 44 Minn. 336, 46 N. W. 559.

114. 35 F. (2d) 883.

115. 37 F. (2d) 993.

*Works*,<sup>115a</sup> the Supreme Court of Washington held that where one of two applications to the Department of Public Works for a certificate of public convenience and necessity was allowed under the Auto Transportation Act of that State, the successful applicant was a necessary party entitled to notice of the review proceedings before its right could be affected. The Court said, *inter alia*:

"But was the Shields Transportation Company also a necessary party and was it entitled to notice of the review proceedings before its rights could be affected? We are of the opinion it was. It was the successful party before the department. Its application had been granted. It had thus acquired valuable rights, which could not be taken from it without its having its day in court. This it has not had. The judgment may have been binding on the department, but that would not accomplish anything.

"It cannot be justly said that the transportation company was represented by the department of public works. That department had acted as a court and had granted certain rights. Thereafter and in the review proceedings it was interested only in assisting the court to make such judgment in the premises as would be just and right. It represented only the public interest."

As to whether a decision such as the foregoing is to be deemed applicable to Section 16 of the Radio Act, the writer expresses no opinion.

In several broadcasting cases it has been contended by the Commission that the appeal becomes moot after the lapse of the maximum period for which the Commission could have issued a license, i. e., three months. For example, in the *General Electric Company* case, the appeal complained of a denial of a renewal application, the renewal license covering the period of three months commencing November 11, 1928. If the Commission had granted the application, the most appellant would have received was a license expiring February 11, 1929, at which time the Commission would have had again to pass upon a new renewal application and determine whether public interest, convenience or necessity would be served by granting it. On February 21, 1929, the Commission filed a written motion to dismiss on this ground; this motion was overruled by the necessary implication of the judgment.<sup>115b</sup> Similar motions were made in other

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115a 1927, 254 Pac. 245. A number of cases are therein cited and discussed.

115b. The cases relied upon by the Commission in support of its motion were *Security Mutual Life Ins. Co. v. Prewitt*, 200 U. S. 446; *American Book Co. v. Kansas, ex rel. Nichols*, 193 U. S. 49; *Jones v. Montagne*, 194 U. S. 147; *Cheong Ah Moy v. U. S.*, 113 U. S. 216; *California v. San Pablo & T. R. Co.*, 149 U. S. 308; *Mills v. Green*, 159 U. S. 651; *U. S. ex rel. Gannon v. Georgetown College* 28 App. D. C. 92; *State ex rel. Rowe v. Martin*,



appeals then pending and in one of them <sup>115c</sup> the Court passed expressly on the point, saying:

"It is argued on behalf of the Commission that this appeal presents a moot question because of the fact that the Commission may not issue a license for a longer period than three months, and that, if the Commission had issued the renewal license which appellant applied for, such license would long since have expired according to its own terms. It is argued that, since the period for which the license might have been issued has expired, this appeal has become moot, and should be dismissed. We do not agree with this contention. Such an interpretation of the act would practically nullify the right of appeal granted by Congress in such cases, for it is rarely possible for a station to secure a decision upon such an appeal within three months after the right of appeal accrues. This fact was of course well known to Congress when the statute was enacted. Moreover the relief sought by an applicant for renewal is not limited to the issue of a license for three months only, but includes a continuing right to apply thereafter at proper times for successive renewals thereof. The statutory appeal accordingly contemplates the restoration to the appellant, if his claim be sustained, of the continuing right to make such application to the Commission as he would have enjoyed had his application first been allowed. We feel justified therefore in entertaining the appeal. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 31 S. Ct. 279, 55 L. Ed. 310."

In a previous subheading the writer has expressed his opinion that, so far as the subject matter of appeals is concerned, the Court of Appeals has power to pass on regulations of the Commission and either to uphold them or to invalidate them.<sup>116</sup>

To what extent may the Court of Appeals, being an administrative tribunal, pass on questions of law, and particularly on questions of constitutional law? In logic, it is submitted, there is only one limitation: where the fundamental validity of the Radio Act of 1927 is attacked. In the earlier cases, the claim was regularly made that the Act was unconstitutional as a violation of the Fifth Amendment;<sup>117</sup> the Commission made the point that an appellant-applicant, having proceeded both before the Commission and the Court of Appeals under the provisions of that law, could not be

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(Fla.) 32 So. 926; *State ex rel. Vann v. Martin*, (Fla.) 36 So. 362; *Galvin v. Davidson*, (Fla.) 37 So. 575; *Yent v. State*, 63 So. 452; *Agee v. Cate*, (Ala.) 61 So. 900; *State ex rel. Kern v. Owens*, (Ind.) 91 N. E. 562; *State ex rel. McClanahan v. Nofztger*, (Ind.) 91 N. E. 562.

115c. *Technical Radio Laboratory v. Commission*, 36 F. (2d) 111.

116. *General Electric Company v. Commission*, 31 F. (2d) 630; *Carrell v. Commission*, 36 F. (2d) 117.

117. *General Electric Company v. Commission*, *supra*; *Technical Radio Laboratory v. Commission*, 36 F. (2d) 111; *City of New York v. Federal Radio Commission*, 36 F. (2d) 115.

heard to question its validity.<sup>118</sup> The Court did not pass on the contention, but upheld the Act as valid.

There is no reason, however, why the validity of particular sections, not affecting the entire act, may not be adjudicated by the Court of Appeals. If a licensee were refused a renewal of license by reason of the drastic provisions of Section 13, he should be able to attack the section on appeal. If an application is denied as the result of the Davis Amendment (Section 5 of the Amendatory Act of March 28, 1928), the validity of the amendment should be open to question on appeal.

May the Court of Appeals enter judgment against an appellant giving him less than he was accorded by the Commission? To illustrate, suppose that in the *Great Lakes Broadcasting Company* case, WLS alone had been involved; that, having 5/7 time, it applied for full time and was denied by the Commission; on appeal may the Court of Appeals decrease it to 1/2 time, or to no time at all? In such a case, the writer believes that, since the Court's revision is confined to the points set forth in the reasons of appeal, the Court should not be considered to have such power. Is the situation changed jurisdictionally by the fact that WENR and WCBD were also appealing? At best, the Court's decision seems doubtful to the writer.

*Stay Orders:* This subject is closely related to that discussed under the preceding subheading. Manifestly the Court of Appeals has no greater power with respect to stay orders than it has with respect to its final judgments. Yet, whereas the Court has not yet entered any final judgment adversely affecting a party which had not voluntarily submitted to the Court's jurisdiction, it has not observed the same limitations with regard to stay orders.

The Court's power to issue these orders has been one of the most bitterly contested issues raised under Section 16. The first attempt to obtain such an order was in an early appeal which was later voluntarily dismissed; the motion was denied.<sup>119</sup> The next attempt was in the *General Electric Company* case, wherein a stay order was granted on November 9, 1928, the same day the appeal was filed.<sup>120</sup> It ordered

"that a stay be, and the same is hereby, granted, and that until the further order of the court Radio Station WGY of the applicant-appel-

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118. *Wall v. Parrott Silver & Copper Co.*, 244 U. S. 407, 411; *Hirsh v. Block*, 50 App. D. C. 56, 267 Fed. 614, and cases therein cited.

119. *People's Pulpit Association v. Commission*, No. 4619. U. S. Daily, July 13, 14, Aug. 1, 1927.

120. U. S. Daily, Nov. 10, 1928.

lant be, and it is hereby, permitted to operate full time on channel 790 kilocycles."

A motion by the Commission to set aside the stay order was argued in briefs of the parties and orally, but was never passed on. Under the peculiar facts of the case, however, the stay order did not affect any third parties.

The next stay order was issued on December 7, 1929, in the *Short Wave Appeal*. The petition for the order, which had been filed on June 24, 1929, was followed by extensive briefs and by oral argument on the petition.<sup>121</sup> This stay order, which was secured by one of the three appellants (Intercity Radio Telegraph Company and its affiliate, Wireless Telegraph & Communications Company), after brief preliminary recitals, ordered

"that during the pendency of these appeals, or until the further orders of the court herein, no permits or licenses shall be granted or issued by the Federal Radio Commission to other applicants for so many of the available frequencies requested by appellants as to reduce the remaining number of available frequencies below the number sufficient to give effect to the decision of this court herein should it be held by the court that appellants' applications should have been granted."

In the domestic high frequency band alone, as has already been explained, the Commission's decisions had disposed of all but one of the channels, but pending the Court's decision on the petition for stay order it had withheld issuance of permits or licenses to the successful applicants (only one of which, R. C. A. Communications, Inc.) was an appellant in the *Short Wave Appeals*. The stay order was so broad in its terms, however, that it, in view of appellant's applications, seemed to cover also the transoceanic high frequency and the low frequency band, with the result that thereafter the Commission withheld issuance of licenses covering transoceanic high frequency channels to persons who had completed construction of stations under construction permits issued as early as August 1, 1928. A motion by the Commission for clarification of the stay order was denied.<sup>122</sup>

Thereafter the Commission, construing the stay order to protect only the appellant upon whose petition it was granted, took action by which it issued construction permits and licenses covering approximately two-thirds of the channels awarded to each of the successful applicants, but conditioned the instruments upon the

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121. *Ibid.*, July 2, 1929; October 21, 1929; Dec. 9, 1929.

122. *Ibid.*, Dec. 31, 1929; Jan. 4, 18, 1930.

ultimate judgment of the Court of Appeals.<sup>123</sup> During the course of the delivery of these instruments, after part of them were in the hands of successful applicants, a second appellant (Mackay Radio & Telegraph Company), without notice, secured a second stay order, holding up delivery of the remainder.<sup>124</sup> The third appellant followed with another petition for a stay order in which it sought to force the Commission to re-possess itself of the licenses and permits already delivered.<sup>125</sup> This third stay order was granted but the Court declined the additional relief requested.<sup>126</sup> A later attempt was made without success to secure mitigation of the terms of the order with respect to one of the concerns adversely affected.<sup>127</sup>

Several other stay orders have been issued since the one of December 7, 1929, in the *Short Wave Appeals*, all in cases involving broadcasting stations. In one case a stay order was granted on the petition of a station which had been respondent to another station's application for modification before the Commission;<sup>128</sup> in another case of the same character a petition was refused.<sup>129</sup> Reference has already been made to the stay orders secured by WHAS and KYW to prevent changes in their assignments proposed by General Order 87; and to the stay orders secured by WGBS and WICC respectively from the Court of Appeals and from the United States District Court in Connecticut, in their controversy over the channel of 600 kc.

The Court's power to issue stay orders adversely affecting parties not before it raises the same question as that discussed under the preceding heading and need not be further considered. An equally important question is: has the Court any power to issue stay orders at all?

Section 11 of the Act creating the Court of Appeals gives it "power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction."<sup>130</sup>

Writs of mandamus, certiorari, prohibition, supersedeas and injunction have all been considered as within the authority conferred by

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123. *Ibid.*, Feb. 26, 27, 1930.

124. *Ibid.* Feb. 27, 1930.

125. *Ibid.*, Mar. 15, 17, 1930.

126. *Ibid.*, Mar. 24, 1930.

127. *Ibid.*, April 3, 1930.

128. *Northwest Broadcasting System, Inc. v. Commission*, No. 5112 (later voluntarily dismissed), U. S. Daily, Dec. 16, 1929; see also Dec. 13, 14, 31, 1929.

129. *WMAK Broadcasting System, Inc. v. Commission*, No. 5117, U. S. Daily, Jan. 24, 1930; see also Dec. 23, 30, 1929.

130. Dist. of Columbia Code, Sec. 230, 27 Stat. 434, et seq.

the statute.<sup>131</sup> The Commission has urged, however, that the statute (which creates the Court as a judicial tribunal and governs its powers as such) should not be extended to apply to the special appellate jurisdiction of an administrative character conferred upon it by Section 16 of the Radio Act of 1927; that, in accordance with the doctrine of cases already cited above,<sup>132</sup> the Court's powers must be found expressly stated in Section 16, and that, since Section 16 confers no authority to issue stay orders, the Court does not have that authority. It is undoubtedly true, as contended by the appellants who have sought stay orders, that, for appeals from decisions of the Commission to have any substantial value, it is frequently necessary to preserve the *status quo*. Whether Congress made adequate provision to meet the necessity is, of course, another question.

The Radio Act of 1927 gives the reviewing court no power to issue licenses. The Commission contends that this is precisely what was accomplished by the stay orders entered in the *General Electric Company* (WGY), the *Northwest Broadcasting System, Inc.* (KJR), and the *General Broadcasting System, Inc.* (WGBS) cases. The Radio Act forbids, under heavy penalties imposed by Section 33, any person to engage in radio communication except under and in accordance with a license from the licensing authority (i. e., the Commission). Ordinarily a stay is not conceived to be applicable to a self-executing decision such as a refusal by the Commission to grant an application for renewal of license.

*Effective date of Commission's decision:* The notice of appeal must be filed "within twenty days after the decision complained of is effective." Compliance with this requirement manifestly is a jurisdictional prerequisite.

The construction of this provision is in a state of uncertainty. In the *General Electric Company* case, the holding seemed to be that the effective date of a denial of an application for renewal of license is the first day of the succeeding license period,<sup>133</sup> which in that case was November 11, 1928. The Commission's decision on the application was actually made on October 12, 1928 (pursuant to a tentative reallocation effective November 11th), and two appeals were taken therefrom, one on November 9th and the other on No-

131. *King v. Nuckols*, 38 App. D. C. 441; *Gritts v. Fisher*, 37 App. D. C. 473. See also *In re MacFarland*, 30 App. D. C. 499; *In re Dahlgren*, 30 App. D. C. 588; *Goldsmith v. Valentine*, 35 App. D. C. 299; *Beal v. Cox*, 14 App. D. C. 368; *U. S. ex rel. Morris v. Scott*, 25 App. D. C. 88; *U. S. ex rel. Holmead v. Barnard*, 29 App. D. C. 431; *Truck Co. v. Motor Co.*, 41 App. D. C. 261.

132. See footnote (13a), *supra*.

133. See facts as set forth in *Radio Prac. & Proc.*, pp. 154-155.

vember 30th (the second being the result of a motion by the Commission to dismiss the first). The Court's opinion suggests that the first appeal may have been premature.<sup>134</sup>

Later, however, in three cases<sup>135</sup> the Court sustained motions by the Commission to dismiss for failure to file the notice within the prescribed 20-day period. Two of these clearly raised the same point: the appeals were from denials of applications for renewal of license and were filed within 20 days of the beginning of the succeeding license period, but not within 20 days of the dates of the Commission's actual decisions. While the Court's actions were not accompanied by opinion, the only ground for dismissal urged by the Commission's motions was failure to file within the 20-day period. The same point is involved in a case now pending before the Commission.

It makes very little difference (so far as renewal applications are concerned) which construction of Section 16 is adopted, but it is desirable that the point be determined. Logic seems to lie on the side of calculating the period from the date of the Commission's decision, unless the Commission itself specifies a later date as the effective date. The word "effective" was used in Section 16 apparently to meet the requirements of the procedure prescribed for revocation of licenses in Section 14; it has no particular significance when applied to decisions on applications for license, etc. Yet, in view of the present practices of the Commission, the construction adopted in the *General Electric Company* case will help to relieve applicants from injustices which they have constantly suffered because of the Commission's frequent failure to make known its decisions in any formal manner for days and even two or more weeks after the decisions are actually made. In the case of an applicant living on the Pacific Coast, notice of the Commission's decision may not reach him until too late to perfect an appeal.<sup>136</sup> On the other hand, the construction adopted in the *General Electric Company* case would be difficult to apply to decisions on applications for construction permits or for licenses.

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134. 31 F. (2d) 630.

135. *By-Products Coal Co. v. Commission*, No. 4984; *Burton Coal Co. v. Commission*, No. 4985; *Wilmington Transportation Co. v. Commission*, No. 5118, U. S. Daily, Nov. 19, 1929, Dec. 27, 1929. A motion for reconsideration was filed in the first two cases and was denied. U. S. Daily, Dec. 2, 1929. The writer is not certain whether in the third case the appeal was too late under any construction of the statute.

136. This happened in the *Wilmington Transportation Co.* case.

*Notice of Appeal and of Reasons Therefor: Service Thereof.* No holding has yet been made with regard to the form or contents of notices of appeal or of the statement of reasons which must accompany them. In practice, the documents actually filed have varied extremely, from very short informal<sup>136a</sup> statements, unsworn to, to long argumentative statements under oath.

In the writer's opinion, the notice of appeal should consist simply in a brief statement that an appeal is thereby taken from a specified decision of the Commission under Section 16 of the Radio Act of 1927, and the decision should be described sufficiently to meet the jurisdictional requirements of the section. The description should include (a) a characterization of the decision as a refusal of an application for construction permit (or license, etc., as the case may be), or a revocation of license; (b) the date on which the decision was effective, and (c) a reference to the Commission's hearing-docket number (when there has been a hearing) under which the proceedings were had; otherwise, to the Commission's file numbers of the applications or licenses. The last, while perhaps not essential, will serve to avoid misunderstanding as to what decision is in question.

The statement of reasons may be confined to an enumeration of respects in which the Commission is claimed to have erred, analogous to an assignment of errors. Following the analogy of rules applicable to assignments of errors, general claims (such as that the decision did not serve public interest, convenience or necessity) run the danger of being held insufficient, and the claims should therefore be as specific as the nature of the case permits. In order to present an intelligible statement on appeal, it is frequently advisable to preface the enumeration of reasons with a brief description of the nature of the case; this has been done in a number of the appeals heretofore taken. Care should be taken, however, to confine statements of fact to matters which will ultimately appear from the record sent up by the Commission, at least in cases where a hearing has been held. In cases where no hearing has been held, the appellant's statement has been used as the vehicle for a long pleading setting up facts which will not appear in the Com-

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136a. The most extreme case of informality which has come to the writer's attention is that of *Lannie W. Stewart v. Commission*, No. 5158, and *Chicago Federation of Labor v. Commission*, No. 4989, both of which were voluntarily dismissed.

mission's record.<sup>137</sup> Where the line is to be drawn in such cases is not easy to determine. The statement of reasons should not, in the writer's opinion, be made to serve as a substitute for the taking of additional testimony under the provision therefor in Section 16. If, in such cases as the *General Electric Company* case, the Court would confine itself to remanding the case for hearing where opportunity for hearing has improperly been denied by the Commission, neither appellant nor the Commission would be under the temptation of attempting to set forth elaborate cases on the facts in their documents filed with the court, and can safely restrict themselves to statements sufficient to reveal the legal questions involved.

In cases where an appellant has sought to attack decisions of the Commission *granting* applications of others, the decisions have been specifically referred to in appellant's statement of reasons and have been alleged to be erroneous for specified reasons.<sup>137a</sup> Where this is not done, it seems likely that appellant will be held to have foreclosed himself from attacking such decisions, the Court's revision being confined to the reasons for appeal.

In all but one<sup>138</sup> of the appeals thus far decided, the statements of reasons have been accompanied by affidavits of the truth of the allegations therein contained. The writer believes that an affidavit is not necessary. A petition for stay order, however, should be supported by affidavit and, if the statement of reasons is used as the basis for such a petition, it should be sworn to.

Since the statute requires service of a "certified" copy on the Commission *before* filing with the Court of Appeals, notice to the Commission should be attached, together with provision for acknowledgment of service by the Commission. There should also be attached a certificate that the copy served is a true copy of the document to be filed.<sup>139</sup> For the sake of ultra-caution, some attorneys have served copies upon the Commission both before and after filing with the Court of Appeals, the second copy being certified by the

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137. The notable example of this was the *General Electric Company* case in which the notice of appeal was accompanied by a long statement of reasons under oath, into which were incorporated by reference about 200 pages of documents, affidavits and unsworn letters of third parties. A motion by the Commission to strike these portions of the document was not passed upon by the Court.

137a. This was done by the several applicants in the *Short Wave Cases*, see footnote 16, *supra*.

138. *Chicago Federation of Labor v. Commission*, not yet reported, U. S. Daily, May 9, 1930.

139. See forms suggested for this purpose by *Moncure Burke, Esq.*, in *Notes on Practice, Court of Appeals*, 2nd ed., Wash., 1928, pp. 104-105, reprinted with supplementary forms in this issue of JOURNAL OF AIR LAW.



Clerk of the Court as a true copy. This, in the opinion of the writer, is unnecessary.

*Motions to Dismiss:* The Commission has, in many of the appeals, filed motions to dismiss and has thereafter filed its statement of grounds for decision accompanied by a reservation of its rights under the motions. There have been involuntary dismissals before oral argument in three cases,<sup>140</sup> and one after oral argument.<sup>141</sup> In several pending cases the Court has reserved decision upon such motions until after argument on the merits.<sup>142</sup> Until it is determined how much or how little should be incorporated in the notice of appeal and statement of reasons therefor, it is difficult to reach any conclusion as to when, if at all, a motion to dismiss may be determined on the basis of insufficiencies in those documents.<sup>143</sup>

In several of the cases, motions to dismiss have been accompanied by typewritten briefs, have been answered by appellants, and have been again supported by reply briefs.

*Record Filed by Commission.* Section 16 requires that

"within twenty days after the filing of said appeal the licensing authority shall file with the court the originals or certified copies of all papers and evidence presented to it upon the original application for a permit or license or in the hearing upon said order of revocation."

Where the Commission has held a hearing, in which all interested parties have participated, no particular difficulty arises as to what should be included in the record. The evidence heard at the Commission's formal hearings is always transcribed and, together with the applications and the decision, constitutes the record on appeal. In cases where no hearing has been held, or, if held, has not been participated in fully by all interested parties, the proper contents of the record are not easy to determine.

Where no hearing has been held, the Commission has, on occasions, sent up a record which incorporated such documents and

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140. See footnote 35, *supra*.

141. *Universal Service Wireless, Inc. v. Commission*, not yet reported, U. S. Daily, May 8, 1930.

142. For a general discussion and enumeration of grounds for dismissal which may be urged on such a motion, see Burke, *Notes on Practice*, etc. (2nd ed.), Secs. 53, et seq.

143. Particular notice should be taken of the rule requiring that motions should be presented in *three* ribbon copies and one carbon. Burke, *Notes on Practice*, etc. (2nd ed.), Sec. 22.

evidence from its files as it has deemed necessary to meet the contentions made by appellant in his statement of reasons for appeal. This practice, while improper, has been necessary to meet statements of reasons which consist in long recitals of fact under oath.

In cases where a hearing has been held and appellant complains of the Commission's action in granting *another's* application as a denial of appellant's application, the evidence heard in support of the successful application may be (as it was in the *Short Wave Appeals*) under an entirely different docket number in the Commission's records in a hearing in which appellant did not participate. Or the successful application may have been granted without hearing, or partly as the result of a hearing and partly as the result of informal hearings held by the Commission of which no record was kept, or as the result of investigations made by individual members of the Commission, its engineers or its other employees. In such cases, no record which the Commission can transmit to the Court will truly reflect the facts and grounds upon which the Commission made the decision on the successful application.

If the record filed by the Commission is incomplete because of omission of specific documents or evidence the defect may be supplied by the usual suggestions of diminution of record.<sup>144</sup>

*Commission's Statement of Grounds for Decision.* The Commission has interpreted the Radio Act as not requiring it to render written statements of grounds for decision except in cases where appeals are taken from its decisions. Consequently, the statements heretofore filed in the Court of Appeals have in each case been prepared in response to appellants' statement of reasons for appeal, and have been drawn up by the Commission's legal division. For this reason, they frequently resemble briefs rather than opinions, and do not necessarily reflect the reasoning of the Commission in reaching its decisions.

In preparing its statement the Commission is faced with questions analogous to those which occur in making up its record, in cases where no hearing has been held or where decisions granting the applications of others are attacked. In such cases, the statements filed are occasionally all there is in the record setting forth the facts on which the Commission relies to justify its decision.

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144. For procedure and form to be used, see Burke, *Notes on Practice*, etc. (2nd ed.), Sec. 62.

Unfortunately the statements of grounds heretofore filed by the Commission are not all available in a form accessible to the practicing lawyer, and such as are available must be searched for in files of the United States Daily, in the annual reports of the Commission, and, to a limited extent, in mimeographed form in the office of the Secretary of the Commission.<sup>145</sup>

*Additional Evidence.* All the law there is on this subject is to be found in Section 16, since the Court has granted only two petitions to adduce additional evidence<sup>145a</sup> and, in these cases and in the several cases where it has denied petitions, has not stated its reasons for so doing.

In one case in which such a petition was filed<sup>146</sup> the petition asked that the Commissioners themselves be required to testify as to their decisions and reasons therefor in other cases, which, it was claimed, were inconsistent with the decision appealed from.<sup>147</sup> In another case, which was later voluntarily dismissed, appellant based a petition on alleged erroneous statements in the Commission's statement of grounds.<sup>148</sup> In still another case,<sup>149</sup> the Court reserved its ruling on a petition until argument on the merits.

In cases where the Commission's decision has been without hearing, the question arises as to whether leave to adduce evidence may be granted at all. The answer depends on the significance to be given to the word "additional." If in such a case a real issue of fact is raised, and a hearing has improperly been refused, the

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145. Two statements are reprinted in full in the 2nd Ann. Rep., pp. 244-249 (*International Quotations Co., Inc.*, No. 4828; *Bull Insular Lines*, No. 4832); excerpts from statements are reprinted in the 3rd Ann. Rep., pp. 31-43 (*Technical Radio Laboratory*, No. 4835; *City of New York*, No. 4898; *Carrell*, No. 4899; *Great Lakes Broadcasting Co., et al*, Nos. 4900, 4901, 4902; *Chicago Federation of Labor*, No. 4972; *Head of the Lakes Broadcasting Co.*, No. 4976; *Baker*, No. 5004; *By-Products Coal Co.*, No. 4984; *Universal Service Wireless, Inc.*, No. 5005; *Intercity Radio Telegraph Co., et al*, Nos. 4987, 4988, 4990, 4991). Statements have been reprinted in full in a number of cases in the U. S. Daily from time to time.

145a. In two of the three first appeals taken from decisions of the Commission denying applications, the Commission was granted permission to adduce additional evidence.

146. *Bull Insular Lines, Inc. v. Commission*, No. 4832, U. S. Daily, Oct. 8, 1928.

147. The denial of applications for point-to-point service, using trans-oceanic high frequencies, for the purposes of an individual business as distinguished from public correspondence.

148. *Lannie W. Stewart v. Commission*, No. 5158.

149. *Westinghouse Electric & Mfg. Co. v. Commission*, Nos. 5104, 5105. In this case the alleged denial of appellant's application has been without hearing.

orderly method of obtaining evidence thereon would seem to be to remand the case to the Commission with appropriate instructions.

In fact, in all cases, instead of the Court's undertaking to hear additional evidence or appointing a commissioner for the purpose, the taking of the evidence might well be referred to the Commission, which is in a better position to accomplish the mission expeditiously, to gauge the weight to be given to technical evidence, to supply the assistance of its records and its engineering division, and to accommodate itself to the convenience of the parties.

*Consolidation of Cases.* Frequently two or more appeals will arise from the same or from related decisions of the Commission. It has regularly been the practice of the Court of Appeals to permit such cases to be treated as one proceeding on appeal, whether or not any formal motion to consolidate is made or granted. This has been true with respect to the record, Commission's statement, motions, briefs, oral argument, and final judgment. Among those cases already decided, this was true in the *General Electric Company* and the *Great Lakes Broadcasting Co.* cases, in neither of which was any such motion made. The same is true of the *Short Wave Appeals*, and others now pending before the Court.<sup>150</sup>

*Effect Given to Commission's Decision.* In *Technical Radio Laboratory v. Commission*,<sup>151</sup> the Court of Appeals said, in meeting appellant's contentions that the Commission's decision was contrary to the evidence, and that the evidence showed that public interest, convenience or necessity would be served by granting appellant's application:

"On this issue the burden is upon appellant, and this court should sustain the Commission's findings of fact unless they are shown by the record to be manifestly against the evidence."

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150. In *Journal Company v. Commission*, Nos. 5095 and 5163, a motion to consolidate was at first denied because the first appeal was nearing oral argument. When it appeared on oral argument that the cases were closely related, the Court postponed further consideration of it to the time when the second might be heard. In *WMAK Broadcasting System, Inc. v. Commission*, No. 5117, and *Onandaga Company v. Commission*, No. 5125, a motion by appellant in the first case was resisted by appellant in the second, although the two decisions grew out of a single controversy. The channel on which the two stations divided time was taken from them and awarded to an applicant for a new station. The writer does not know what disposition was made of the motion.

151. 36 F. (2d) 111, 114.

This rule, however, was not applied in the *Great Lakes Broadcasting Co.* case, where, on the issues between WLS and WENR, there was an exceedingly close balance in the evidence, as is demonstrated, *inter alia*, by the fact that the four Commissioners who heard the case, divided two and two in their decision. On account of the division in the vote apparently, the Court undertook to decide the case *de novo* on the evidence in the record.

*Costs.* In the *General Electric Company* case, costs were assessed against the Commission by the Court of Appeals. These costs were never paid, and costs have not been assessed against the Commission on any of the appeals decided since then.

Section 16 is silent on the subject of costs. On appeals under its provisions, if the Court of Appeals sits as a supervisory administrative tribunal, the Commission is not a party in the usual sense of the word; it is an inferior tribunal of original jurisdiction. The rule that permits assessment of costs against other commissions (as distinguished from the assessment of costs against the United States) where the Court sits in a judicial capacity in proceedings brought to enforce or set aside orders of such commissions, is not, in the writer's opinion, applicable.

A judgment for costs, furthermore, would seem to be essentially an exercise of a judicial function.<sup>152</sup>

*Miscellaneous Matters of Practice.* Rule 32 of the Court of Appeals provides:

"The general rules of this Court, regulating the practice thereof, and the requirements as to the printing of records and filing of briefs, shall apply to appeals under the act for the regulation of radio communications. Such cases will be placed on the special calendar. After the determination of the case, a copy of the opinion and judgment will be certified to the lower tribunal, in lieu of a mandate, in the usual course."<sup>153</sup>

Just prior to the opening of the October term in the fall of 1929 the Court rearranged its special docket and since then has proceeded with dispatch to hear such cases as were ready for oral argument.

152. See *Tesla Electric Co. v. Scott*, 101 Fed. 524. If the court should again assess costs against the Commission, seemingly the only way for its power to be tested out is for the Commission to refuse to pay.

153. For an excellent and trustworthy guide to practice in the Court of Appeals, see *Burke, Notes on Practice*, etc. (2nd ed.).

*Conclusion.* The major defects in the statute seem likely to be remedied in the near future by Congress.<sup>154</sup> The remedying of

154. See 1930 *Communications Com. Rep.*, Chap V, for a discussion of bills now pending in Congress to amend Section 16. These bills propose to give all interested parties equal rights to appeal and to participate in appeals, and certain of them propose to confine the Court of Appeals to judicial functions, with provision for review on certiorari by the Supreme Court.

*Note on Extraordinary Remedies.* This subject should properly be the subject of a separate article, and the writer will confine this note to mention of some of the more obvious considerations, without extended discussion.

Cases now pending before the Supreme Court of the United States (*White v. Johnson, et al.*, 29 F. (2d) 113, and *U. S. v. American Bond & Mortgage Co.*, 31 F. (2d) 448) on questions certified by the Seventh Circuit Court of Appeals, involve the constitutionality of the Radio Act of 1927. In both cases, appellants, in addition to attacking the validity of the Act, sought to attack decisions of the Commission denying applications for renewal of license as having been rendered without due process, not supported by any evidence, etc. In both cases appellants had had hearings before the Commission and had failed to appeal under Sec. 16. The U. S. District Court in Chicago held that they could not question the Commission's decisions under such circumstances. In *White v. Johnson*, appellant instituted suit against the U. S. Attorney and the members of the Commission to restrain not only enforcement of the penal provisions of the Act but also the Commission's "order." Since a decision denying an application is self-executing, it would seem that there is nothing to restrain with respect to it. The bill was, at the outset, dismissed as against the members of the Commission, who declined to enter an appearance.

Decisions of the Commission seem likely to be brought into question in several ways other than on appeals under Sec. 16, e. g., by mandamus or injunction directly against the members of the Commission, by injunction against stations benefiting from decisions of the Commission rendered without notice or hearing to the party aggrieved, and, in isolated cases, perhaps also against U. S. Attorneys to restrain enforcement of penal provisions of Sec. 32 for violation of regulations of the Commission alleged to be invalid. What decisions may be questioned in this manner depends not only on the validity of Sec. 16 but also on what are found to be appealable decisions under Sec. 16 and on whether, if a decision in a particular case is appealable, the appeal furnishes an adequate remedy, e. g. (whether appellant has the right to a stay order.) *Prentiss v. Atlantic Coast Line*, 211 U. S. 210; *Globe Newspaper Co. v. Walker*, 210 U. S. 356; *Keokuk & Hamilton Bridge Co. v. Salm*, 258 U. S. 122; *Palmolive Co. v. Conway*, 37 F. (2d) 114; *Tl. C. Hurst v. Federal Trade Commission*, 268 Fed. 874; *Snelling v. Whitehead*, 268 Fed. 712. In *Technical Radio Laboratory v. Commission*, 36 F. (2d) 111, 114, the Court of Appeals said:

"A hearing upon notice and an appeal to this Court are allowed in case of a refusal. The validity of such a refusal may also finally be tried upon proper issues in other forums."

The kinds of decisions which may prove to be not appealable under Sec. 16 have been sufficiently covered in the above article, in which mention has been made of two of the cases now pending in which suit for injunction has been instituted: *Stromberg-Carlson Telephone Mfg. Co., v. Saltzman, et al.* (Sup. Ct. Dist. of C. Equity No. 51325) in which complaint is made of a shift in frequency to one on which another station will cause interference, without notice or hearing, and of the Commission's General Order 87; and *General Broadcasting System, Inc. v. Bridgeport Broadcasting System, Inc.*, D. C., D. of Conn., in which suit is brought against another station to restrain it from operating on the channel used by plaintiff. There are two other cases

some of the important defects in its administration will rest with the Commission, and, it failing, with the Court of Appeals.

After all, the function exercised by the Federal Radio Commission is primarily that of a licensing authority. It determines who shall and who shall not have licenses, under the broad test of "public interest, convenience or necessity." The United States is, so far as the writer knows, the only country in the world in which an extensive body of law is being built around the exercise of this function. In most of the other important countries, radio communication (including broadcasting) is largely under the direct ownership or control of the Government, and in such countries there is no need or occasion for elaborate rules and a multiplicity of decisions to govern the choice of a few licensees from a large body of applicants. The American system of allowing radio communica-

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pending of a similar nature. In *Baltimore Radio Show, Inc. (WFBR) v. Baltimore Broadcasting Corporation (WCBM)* and *Federal Radio Commission*, the U. S. District Court at Baltimore issued, on May 24, 1930, an order restraining WCBM from operating on 1210 kc. or on any frequency other than its former channel of 1370 kc. This was followed by a similar order against the Commission issued by the Supreme Court of the Dist. of Col. WFBR operates on 1270 kc. and alleges that the 60 kc. separation would cause ruinous interference. The shift had been made without notice or hearing to WFBR. In many respects the facts of the case resemble *Tribune Co. v. Oak Leaves Broadcasting Station, Inc.*, (Cir. Ct., Cook County, Ill., No. B-136864, Nov. 20, 1926, unreported, Cong. Rec. Vol. 68, pp. 216-219, Zollmann's *Cases on Air Law*, p. 298), in which the separation complained of was 40 kc. The other case pending is *Don Lee (KHJ) v. Saltzman, et al.* (Sup. Ct. Dist. of C., Equity No. 51466), in which injunction is sought to restrain commission from authorizing KGA, Spokane, Wash., to operate on the channel (900 kc.) used by KHJ, Los Angeles. The shift was threatened without notice or hearing to KHJ, a temporary restraining order was issued on May 26, 1930, U. S. Daily, May 27, 1930. See *Frost v. Corporation Commission*, 278 U. S. 515; *Ohio Valley Water Co. v. Ben Avon*, 253 U. S. 287.

Occasion for mandamus may arise if the Commission refuses to take any action at all on an application (in which case it may presumably be required to take action but not to render a particular kind of decision), or if, having found that public interest, convenience or necessity, will be served by granting an application, it refuses to issue or deliver the license or permit applied for. Such situations may easily arise as a result of stay orders issued by the Court of Appeals. See cases cited in footnote 18 in the above article. It does not seem logical that in case the Commission has made such a finding it should be considered free for an indefinite period to change its mind, or that the rule of such cases as *Wilbur v. U. S. ex rel. Kadrie*, Adv. Ops. 1929-1930, p. 433, should be considered applicable.

In a case where a decision of the Commission is appealable and an appeal is taken and decided by the Court of Appeals adversely to appellant, may the latter, by appropriate proceeding against the Commission, raise the questions of law which are usually permitted to be raised in attacks upon decisions of administrative tribunals? Under the Supreme Court's decision in the *General Electric Company* case, since the Court of Appeals, like the Commission, is an administrative tribunal, its decisions should be open to question in this manner. The Court of Appeals seems to recognize this in the *Technical Radio Laboratory* case, *supra*. See *Philadelphia Co. v. Stimson*, 223 U. S. 605.

tion to be conducted by private enterprise seems to have demonstrated its superiority; at any rate, it is in accord with prevailing American institutions and traditions. Radio communication, however, has introduced a relatively new problem into jurisprudence, which has its roots in the inexorable scientific fact that the number of persons who may simultaneously engage in radio communication is rigidly limited by the laws of radio physics. There are not sufficient available facilities to permit free play and an open door to all private enterprises that wish to enter the field. Consequently a method has had to be devised for choosing a few out of many. This method should meet the fundamental tests of due process of law so that the many will have their opportunity to be heard and the few who are chosen and invest their money will be protected. The method, however, must not be permitted to become so complicated with technicalities, delays and red tape as to constitute a constant burden to the licensees engaged in the business of radio communication or to deprive them of the sense of stability and security (conditioned on good service) which they need fully as much as, and probably more than, persons engaged in other kinds of business.